CORRECTED COPY

Supreme Court, U.S.
FILED
SEP 18 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

DAVID BERMAN,
Counsel of Record,
JANE KENWORTHY LEWIS,
BERMAN AND MOREN,
100 George P. Hassett Drive,
Medford, Massachusetts 02155-3297.
(617) 395-7520
Attorneys for the Petitioners

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

89 [illegible]

Questions Presented.

I. Under Education of the Handicapped Act (EHA), 20 U.S.C. § 1415(e)(3), where parents unilaterally decide to place a child in a private school, do they forfeit the right to be reimbursed for tuition and expenses related to such placement?

II. Where Federal law mandates a preference that a handicapped child be educated in the public schools, may a State order private school placement of a child on the basis of the local school authorities' past violations of State procedures?

III. In a trial under 20 U.S.C. § 1415(e)(2), does a court have authority to refuse to hear witnesses who testified or could have testified at State administrative proceedings?

IV. Where the Court of Appeals explicitly decided a prior appeal in this case on the ground that the parents would ultimately be responsible for the expenses of private education for their child if they did not prevail on the merits, could it in a subsequent appeal from a judgment on the merits against the parents determine that local school authorities would be liable for at least part of such expenses?

V. Does EHA provide a remedy by way of damages to reimburse parents for private school tuition and related expenses incurred in the education of a handicapped child?

VI. Are parents who unilaterally placed their child in a private school for the school year 1979-1980 and then attached patently unlawful conditions to preparing an IEP for subsequent years entitled to reimbursement of tuition and related expenses for such years?

Table of Contents.

Citations to opinions below 2

Jurisdiction 2

Statutory citations 3

Statement of the case 3

Amplification of reasons relied on for the allowance of the writ 9

I. Where parents of a handicapped child without permission of local or state school authorities placed him in a private school, they forfeited any right to reimbursement for the year of initial placement (1979-1980) and for subsequent school years 9

II. If Massachusetts has a policy of punishing local school authorities who deviate from state-mandated standards for the education of a handicapped child by requiring them at their expense to educate such a child in private schools, that policy conflicts with EHA and is unenforceable 15

III. The restrictions placed by the Court of Appeals on the rights of parties to offer evidence are erroneous 17

IV. The Court of Appeals should have applied the doctrine of law of the case and ruled on the basis of *Burlington I* that petitioners, as prevailing parties, were entitled to be reimbursed by the parents for amounts expended on Michael's tuition and related expenses 21

V. Even apart from the doctrine of law of the case, respondent Panicos are not entitled to damages 23

VI. Where the parents were very clear that they would not cooperate in any effort to compose an IEP for the years subsequent to 1979-1980, they are not entitled to any reimbursement for monies spent on private education for those years 28

Conclusion 30
Appendix follows page 30

Table of Authorities Cited.

CASES.

Age v. Bullitt County Public Schools, 673 F.2d 141 (6th Cir. 1982) 20
Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341 (1951) 11
Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480 (1978) 26n
Anderson v. Thompson, 495 F. Supp. 1256 (E.D. Wis. 1980) 17n, 23n, 24n
Board of Education, Island Trees Union Free School District v. Pico, 102 S.Ct. 2799 (1982) 20
Board of Health of North Adams v. Mayor of North Adams, 368 Mass. 554 (1975) 11
Burlington I, 655 F.2d 428 (1981) 19, 21, 22
Capital Cities Cable Inc. v. Crisp, 104 S.Ct. 2694 (1984) 17
Carpa Inc. v. Ward Foods, Inc., 567 F.2d 1316 (5th Cir. 1978) 22
Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) 23
County of Monroe, Florida v. U.S. Dept. of Labor, 690 F.2d 1359 (11th Cir. 1982) 23
Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982) 23
Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983) 10, 23
Henrick Hudson District Bd. of Ed. v. Rowley, 458 U.S. 176 (1982) 19

Irving v. Independent School Dist. v. Tatro, 104 S.Ct. 3371 (1984) 14

Isgur v. School Committee of Newton, 9 Mass. App. Ct. 290 (1980) 15n, 16n

Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied* sub nom. Baldwin v. Joy and Citytrust v. Joy, 103 S.Ct. 1498 (1983) 29n

Kruelle v. New Castle County School Dist., 642 F.2d 687 (3d Cir. 1981) 20

MacDonald v. Board of Assessors of Mashpee, 381 Mass. 724 (1980) 30

Marvin H. v. Austin Independent School Dist., 714 F.2d 1348 (5th Cir. 1983) 13n, 23

M'Culloch v. Maryland, 4 Wheat. 316 (1819) 14

Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 215 (1982) 23

Minersville District v. Gobitis, 310 U.S. 586 (1940) 20

Monahan v. Nebraska, 645 F.2d 592 (8th Cir. 1980) 9, 12, 13n

Moore v. Jas. H. Matthews & Co., 682 F.2d 830 (9th Cir. 1982) 22

Mt. View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983) 12, 13, 23, 27

O'Shea v. Littleton, 414 U.S. 488 (1974) 11

Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U.S. 196 (1924) 11

Permian Basin Area Rate Cases, 390 U.S. 747, reh. denied, 392 U.S. 917 (1968) 23n

Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983) 23

Rea v. Aldermen of Everett, 217 Mass. 427 (1914) 26n

Rizzo v. Goode, 423 U.S. 362 (1976) 11

Rowe v. Henry County School Board, 718 F.2d 115 (4th Cir. 1983) 9, 12, 14

Schweiker v. Hansen, 450 U.S. 785 (1981) 30

Stacey G. v. Pasadena Independent School Dist., 695 F.2d 949 (5th Cir. 1983) 11, 13n

Stemple v. Board of Education, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981) 9, 10, 12, 13, 25 et seq.

Stock v. Massachusetts Hospital School, 392 Mass. 205 (1984) 11, 26

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir. 1974), *cert. denied*, 419 U.S. 987 (1974) 22

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916) 26

United States v. Gillock, 445 U.S. 360 (1980) 14, 16

United States v. Morton, 104 S.Ct. 2769 (1984) 13

Vander Malle v. Ambach, 673 F.2d 49 (1982) 13n

Whittaker Corp. v. Execuair Corp., 736 F.2d 1341 (9th Cir. 1984) 24n

STATUTES.

United States Constitution
Article VI, Supremacy Clause 3, 14

20 U.S.C. § 1401 3
1411 3
1412 3
1412(5)(B) 16
1414 3
1414(a)(C)(iv) 16
1414(b) & (d) 11
1415 3, 14

	1415(c)-(e)	27
	1415(e)(2)	6, 7n, 11, 13, 19, et seq.
	1415(e)(3)	5, 9, 10, 11, 12 et seq.
	1416	3, 11
28 U.S.C. §	1254(1)	3
42 U.S.C. §	1983	27
34 C.F.R. §	300.121a	3
	300.126	3
	300.128-130	3
	300.180-240	3
	300.300	3
	300.304	3
	300.343	3
	300.347	3
	300.347(a)	29
	300.347(a)(1)-(2)	13
	300.403	3
	300.452	3
	300.501	3
	300.503	3
	300.504	3
	300.530-534	3
	300.540-543	3
	300.550-554	3
	550(b)(1)	16
Federal Rules of Appellate Procedure		
Rule 3(c)		3
Federal Rules of Civil Procedure		
Rule 35		29n
Rule 54(b)		6
Federal Rules of Evidence		
Rule 408		26

Massachusetts General Laws
c. 30A, § 14 6, 7, 21
c. 30A, § 14(7) 7n
c. 71B, § 10 3, 27n
603 C.M. R. 311.0 et seq. 29
311 3
327.1 3, 27n
327.2 3, 27n
330.333 et seq. 3, 29n
403.0 26n
409.0 3, 14, 27n

MISCELLANEOUS.

Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892 (1982) 25
Note, The Right to Jury Trial In Enforcement Actions Under Section 502(a)(1)(B) of ERISA, 96 Harv. L. Rev. 737 (1983) 25

No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioners pray that a writ of certiorari issue to review and reverse a judgment of the United States Court of Appeals for the First Circuit issued on May 29, 1984 and an order of June 29, 1984 denying a petition for rehearing.

Citations to Opinions Below.

The following opinions are reprinted in the record-appendix. They are unreported unless otherwise noted.

1. Opinion of the Bureau of Special Education Appeals of the Department of Education of the Commonwealth of Massachusetts dated January 31, 1980.

2. Opinion of the United States District Court for the District of Massachusetts, Zobel, J., dated November 19, 1980.

3. Opinion of the United States Court of Appeals for the First Circuit dated June 18, 1981 and reported at 655 F.2d 428 (1st Cir. 1981).

4. Pre-trial Order of the United States District Court for the District of Massachusetts, Zobel, J., dated March 18, 1982.

5. Memorandum of Decision of the United States District Court, Zobel, J., for the District of Massachusetts dated August 13, 1982.

6. Opinion of the United States District Court for the District of Massachusetts, Aldrich, J., dated March 7, 1983 and reported at 561 F.Supp. 121 (D. Mass. 1983).

7. Opinion of the United States Court of Appeals for the First Circuit dated May 29, 1984 and reported at 636 F.2d 773 (1st Cir. 1984).

8. Judgment of the United States Court of Appeals for the First Circuit, entered May 29, 1984.

9. Opinion of the United States Court of Appeals for the First Circuit denying a motion for rehearing dated June 29, 1984.

Jurisdiction.

On May 29, 1984 the United States Court of Appeals for the First Circuit entered judgment affirming in part and reversing in part a judgment of the United States District Court for the District of Massachusetts. Plaintiffs were given until June 18,

1984 to file a petition for rehearing and filed a petition for rehearing on that date. On June 29, 1984 the petition for rehearing was denied. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Citations.

The following are found in the statutory appendix:

Constitution of the United States, Art. VI, Supremacy Clause.

United States Statutes: 20 U.S.C. § 1401, 20 U.S.C. § 1411, 20 U.S.C. § 1412, 20 U.S.C. § 1414, 20 U.S.C. § 1415, 20 U.S.C. § 1416.

Federal Regulations: 34 C.F.R. §§ 300.121a, 300.126, 300.128-130, 300.300, 300.304, 300.343, 300.347, 300.403, 300.452, 300.501, 300.503, 300.504, 300.530-534, 300.540-543, 300.550-554.

Federal Rules of Appellate Procedure: Rule 3(c); State Statutes; Mass. G.L. c. 71B, § 10; State Regulations: 603 C.M.R. 311, 327.1, 327.2, 330-333, 403, 409.

Statement of the Case.

In September of 1976 Michael Panico, then aged five, entered the first grade at the Memorial School, a public school of the Town of Burlington, (Massachusetts) (the Town). At the end of that school year his teacher, citing "immaturity" on Michael's part, recommended that he be considered for retention. His parents, however, insisted that he be given a core evaluation to determine whether he had a learning disability and, if so, the appropriate program of remediation. Although the parents were not informed that such an evaluation could

include an independent medical assessment, the evaluation, including a medical assessment, was carried out. At its conclusion the parents asked that no individual education plan (IEP) be drawn up. Michael was to be privately tutored over the summer.

Michael entered the second grade at Memorial School in September of 1977. In the middle of the ensuing school year, after Michael suffered a severe illness (apparently unrelated to whatever learning disabilities he had), the local school authorities drew up an IEP, approved by his parents, under which Michael remained at the Memorial School but spent some time each week in a reading clinic. The IEP was to remain in effect for the 1978-1979 school year.[1]

On May 24, 1979 Michael exhibited symptoms of serious emotional disburbance at home, after he missed recess and lunch because of routine testing that had been carried out by special education personnel. His father called the Town's Coordinator of Special Education and demanded an immediate new core evaluation, which was carried out at once. A team was convened and found that Michael suffered from serious reading disabilities. After a meeting in which his parents participated, an IEP was drawn for the 1979-1980 school year placing Michael in a special education classroom of the Pine Glen School, another public school of the Town. The IEP provided

---

[1] A state hearing officer found that Petitioners had modified the IEP for 1978-1979 without the parents' consent, the time that John would have spent in the learning center with his reading tutor, Ms. Black, supposedly having been unauthorizedly shared with another student. The hearing officer seems to have misunderstood the evidence. John was not required at any time to have a single period of the day during which he was the only student working with Ms. Black. That would have been, according to uncontroverted testimony, a waste of Ms. Black's time, since part of Ms. Black's time would be spent in assigning John independent work to "reinforce" what she had immediately taught. He was, however, required to have one hour a day under her tutelage, and this he had at all times had from March of 1978 to June of 1979.

that Michael would be able to take gym with nonhandicapped children and would as soon as possible take mathematics with them as well. The parents rejected the IEP and without seeking or obtaining permission from local or state educational authorities enrolled Michael in the Carroll School, a private school in Lincoln, Massachusetts exclusively for children with learning disabilities. At the same time they appealed the IEP to the Bureau of Special Education Appeals (BSEA) of the Department of Education of the Commonwealth of Massachusetts.

BSEA designated a hearing officer to hear the appeals. After four days of hearing in September, October and November of 1979, the hearing officer, on January 31, 1980, rendered a decision that the appropriate placement for Michael was in the Carroll School and ordered the Town of Burlington and its school committee to pay for such placement. At least one problem that has plagued this controversy since then is that the reasons for her decisions were less than clear. On one hand, she indicated that she would have considered Pine Glen an appropriate placement if the Town had not been guilty of certain procedural irregularities in the way that it had handled Michael's placement especially in 1977. On the other hand, she implied that the person who would have been Michael's teacher at Pine Glen had his parents not placed him in the Carroll School did not have sufficient experience in dealing with handicaps like his.

Believing that the teacher at Pine Glen was remarkably well suited to address Michael's learning problem and that the so-called procedural violations found by the hearing officer were trivial, irrelevant, outside the scope of the notice and hearing, and totally explained by the circumstances, and that in any event the parents' unilateral placement of Michael in the Carroll School made them ineligible for reimbursement under 20 U.S.C. § 1415(e)(3), the Town and its School Committee on Febru-

ary 26, 1980 sought review in the United States District Court for the District of Massachusetts pursuant to 20 U.S.C. § 1415(e)(2). Its complaint was in two counts, the first invoking the District Court's jurisdiction under and seeking an evidentiary hearing pursuant to § 1415(e)(2) and the second invoking the Court's pendant jurisdiction, to set aside the decision under the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, § 14, on the basis of errors apparent upon the record. Petitioners also sought a stay of the BSEA decision.

In July of 1980 the District Court denied a stay, and Petitioners appealed. In November of 1980, the Court granted summary judgment against Petitioners on the second count and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure entered immediate judgment, from which Petitioners appealed. Finally, in February, 1981 the District Court ordered Petitioners to reimburse the parents for tuition and related expenses incurred by them in the 1979-1980 school year and again Petitioners appealed. In February, 1981, faced with a threat by the Department of Education to cut off their Federal EHA funds (A. 40a, 71a; 655 F.2d at 430, 431; 561 F.Supp. at 124), Petitioners agreed to pay for Michael's education at the Carroll School until the end of the District Court action with the strict understanding that if they were successful in the litigation, the Panicos would repay the money.

In July of 1980 Petitioners also asked the Panicos to make Michael and the records of the Carroll School available for a ten-month evaluation. Through their counsel they refused. A few months later they asked Petitioners to write an IEP for Michael, presumably for the 1980-1981 school year and agreed to make Michael and the records available but attached to the request the condition that the persons on the team "be not adversaries in any court proceeding or under the influence of an adversary." At this time, of course, litigation between Petitioners and the Panicos was still pending, and Petitioners declined to accept the conditions. No subsequent IEP was drawn.

For reasons that are not of immediate concern, Petitioners' appeals from the denial of a stay, the judgment on the second count, and the interlocutory order for reimbursement were consolidated for decision (A. 41a; 655 F.2d 428, 431) (1st Cir. 1981) (*Burlington I*). The order granting summary judgment was vacated on the ground that 20 U.S.C. § 1415(e)(2) displaced all inconsistent state remedies and review under M.G.L. c. 30A, § 14 was an inconsistent remedy[2] (A. 41a-43a; 655 F.2d at 431-432). The order denying a stay was affirmed on the ground that Petitioners had not shown that they would suffer irreparable damage in the absence of a stay (A. 43a-46a; 655 F.2d at 432-433), and the interlocutory order for reimbursement was vacated on the ground that Respondents had not shown that they would suffer irreparable damage if reimbursement was not required (A. 46a-47a; 655 F.2d at 433-434). The Court was thus able to avoid the factual and legal merits of the controversy and returned the case to the District Court for trial.

The case was tried in May of 1982. At the time of trial Michael was completing his third year in the Carroll School, though there had been no formal placement by state or local educational authorities for years after 1979-1980. Both Petitioners and the parents presented expert testimony of a very high level and other witnesses, including the person who would have been Michael's teacher at Pine Glen; some of these witnesses had testified at the BSEA hearing. Respondent Department of Education offered no evidence. In August of 1982 the District Court rendered a decision basically finding that the

---

[2] Petitioners have not presented the correctness of this ruling as a question in this petition. They suggest, however, that it was erroneous. A District Court or a state court could, prior to holding the evidentiary hearing required by § 1415(e)(2), determine that the decision of BSEA is erroneous on the face of the record and thus avoid an evidentiary hearing, either remanding the case to the agency or ordering the entry of a correct decision. See M.G.L. c. 30A, § 14(7).

1979 IEP, placing Michael at Pine Glen, would have offered him free, appropriate public education and that Petitioners could and would have implemented the IEP (A. 62a-63a). The Court also found that the parents had not met their burden of proving that the placement in the Carroll School for years subsequent to 1979-1980, as to which no IEP had been drawn, was appropriate (A. 66a). The form of the judgment became the subject of still further hearings, one of which was before Judge Aldrich, who ruled that Petitioners were not liable for any of Michael's tuition and related expenses at the Carroll School and that the parents were required to reimburse Petitioners for tuition and related expenses paid to the parents since February of 1981 except for the amounts that Petitioners had received toward Michael's education from the Commonwealth of Massachusetts (A. 84a-86a; 561 F.Supp. at 130). A judgment consistent with Judge Zobel's memorandum and Judge Aldrich's opinion was entered on May 9, 1983. Respondents appealed from the judgment generally, and Petitioners cross-appealed only from so much of the judgment as permitted the parents to subtract from what they were to pay Petitioners the sums received by Petitioners from the Commonwealth of Massachusetts toward Michael's education.

For purpose of the appeals the First Circuit, at the suggestion of the parties, treated Petitioners as appellees and Respondents as appellants. On November 8, 1983 the Court of Appeals heard oral argument. On May 29, 1984 it filed a sixty-two page slip opinion, affirming in part and reversing in part and ordering Petitioners to pay costs of appeal. Petitioners sought permission to file a fifty-page petition for rehearing but were given leave to file a petition of only twenty-five pages; the time to file it was extended until June 18, 1984. On that date the petition was filed. It was denied on June 29, 1984, although a change was made in the opinion (A. 148a).

Amplification of Reasons Relied on for the Allowance of the Writ.

I. WHERE PARENTS OF A HANDICAPPED CHILD WITHOUT PERMISSION OF LOCAL OR STATE SCHOOL AUTHORITIES PLACED HIM IN A PRIVATE SCHOOL, THEY FORFEITED ANY RIGHT TO REIMBURSEMENT FOR THE YEAR OF INITIAL PLACEMENT (1979-1980) AND FOR SUBSEQUENT SCHOOL YEARS.

The Court of Appeals stated (A. 126a-127a; 736 F.2d at 796-797):

> The Town argues that we should affirm the district court's ruling in its favor on the basis of the parents' conduct in September 1979. Specifically, it urges that because John's parents enrolled him in the private Carroll School prior to the conclusion of the state administrative proceedings, they violated § 1415(e)(3), and are therefore barred from any reimbursement relief. That section provides in pertinent part:
>
> > During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, . . . until all such proceedings have been completed.
>
> 20 U.S.C. § 1415(e)(3). In support of its position, the Town cites two Fourth Circuit cases, *Rowe* v. *Henry County School Board*, 718 F.2d 115 (4th Cir. 1983); *Stemple* v. *Board of Education*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981), and one Eighth Circuit case, *Monahan* v. *Nebraska*, 645 F.2d 592, 598 (8th Cir. 1980). The State and Does argue that the child has no current educational placement and that the State and parents had "otherwise agree[d]."

> We have already departed from *Stemple* and joined the Seventh Circuit in ruling that § 1415(e)(3) "establishes a strong preference, but not a statutory duty, for maintenance of the status quo." *Doe* v. *Brookline*, 722 F.2d at 918. We expressly reserved opinion on whether parental "self-help" constitutes a bar to a reimbursement remedy at final judgment. That question is now squarely before us, and we respectfully decline to follow the Fourth Circuit.

For declining to follow the Fourth, Eighth and Ninth Circuits, not to mention the clear language of Congress, the Court gave several reasons, *viz*, (a) that a member of Congress had expressed the opinion that a "change of placement should not be delayed while long and tedious appeals were being exhausted," (b) that some school districts might deliberately use the rationale of *Stemple* and like cases to avoid their duties to diagnose and place handicapped children, (c) that § 1415(e)(3) is intended to be directory rather than mandatory, (d) that irreparable damage might be done to a child who was forced to remain in an inappropriate placement until the administrative process was completed and a court could issue a preliminary injunction, and (e) that the financial risk involved in placing a child in a private school that was later found to be inappropriate was a sufficient deterrent to a hasty or ill-considered transfer (A. 128a-131a; 736 F.2d at 797-799).

We address these reasons briefly. First, we note that § 1415(e)(3) as construed in *Stemple* and like cases is not inflexible and does not necessarily bar a change in placement while proceedings are pending. The parents may change the placement while proceedings are pending provided that the local or state authorities agree to the change. There is nothing "inflexible" about asking private persons not to attempt to incur huge charges to the public fisc without official authorization; here, there is no evidence that the parents even sought such authorization before acting. Second, there is no basis for

a belief that local educational authorities will so frequently and deliberately disregard their duties toward handicapped children under Federal law that self-help is the only practicable remedy. All presumptions are to the contrary. *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974); *Rizzo* v. *Goode*, 423 U.S. 362, 370 (1976); *Board of Health of North Adams* v. *Mayor of North Adams*, 368 Mass. 554, 569 (1975). Federal law, moreover, provides for serious financial sanctions against states and local school districts that do not live up to the requirements of EHA. 20 U.S.C. § 1414(b) and (d) and § 1416. Third, the Court seems to have misunderstood the powers of a district court to issue a preliminary injunction to prevent irreparable damage; if, as the Court of Appeals assumed (A. 136a; 736 F.2d at 801, n.35), a district court has power in light of § 1415(e)(3) to issue a preliminary injunction ordering a specific placement while proceedings under § 1415(e)(2) are pending, see *Stacey G.* v. *Pasadena Independent School Dist.*, 695 F.2d 949, 955, n.5 (5th Cir. 1983), the exercise of that power does not have to await completion of administrative proceedings. The rule requiring exhaustion of administrative remedies has always yielded to the principle that Federal courts have the power to issue preliminary injunctions to prevent irreparable damage to Federal rights. *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U.S. 196, 201, 204-205 (1924); *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341, 349-350 (1951) (*dictum*). The Supreme Judicial Court of Massachusetts has so construed the power of the Trial Court of Massachusetts in EHA cases. *Stock* v. *Massachusetts Hospital School*, 392 Mass. 205, 213 (1984). Fourth, Congress could have allowed self-help to parents dissatisfied with local- or state-mandated placement and allocated to them the financial risk of nonreimbursement if the self-help proved inappropriate, but in § 1415(e)(3) Congress chose to prohibit self-help. It could have enacted this prohibition for any number of reasons, any of which would be totally rational, *e.g.*, avoiding undue pressure on state and local au-

thorities to "ratify" parental decision after they were *fait accompli*, equalizing the positions of poorer parents and wealthier parents, the latter being likelier to take financial risks, avoiding totally inappropriate private school placements even where (as was *not* the case here) the public school placement was inappropriate.

The court also raised the possibility that since Petitioners had proposed in June of 1979 to place Michael in the Pine Glen rather than the Memorial School where he had spent the 1978-1979 school year, both parties were proposing a change of placement, and therefore, § 1415(e)(3) was inapplicable (A. 132a; 736 F.2d at 799).[3] Petitioners do not agree. The "placement" to which § 1415(e)(3) refers is, Petitioners submit, the placement in effect or scheduled to be in effect at the time the parents propose to make or make the change. In the present case because the parents enrolled Michael in the Carroll School during the summer recess, the placement mandated by the IEP never took effect. But this was also the case in *Monahan* v. *Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981) and *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 116-117 (4th Cir. 1983), cases cited by the First Circuit as being in accord with *Stemple*. In *Mt. View-Los Altos Union High School Dist.* v. *Sharron B.H.*, 709 F.2d 28, 29 (9th Cir. 1983), also cited by the First Circuit as being in accord with *Stemple* (A. 127a; 736 F.2d at 796, n.31), the parents changed the placement at a time when there was for all intents and purposes no placement. If the First Circuit meant to say that § 1415(e)(3) applies only to a school room actually being attended by a handicapped child at the time the challenged IEP is adopted, then its judgment is still contrary to *Monahan* and *Rowe* and probably contrary to *Mt. View*. It is also contrary to sound practical considerations. In the present case for example, neither the

[3] The case does not seem to have been decided on this ground. If it had been, the *Stemple* issue would not have been "squarely" before the Court (A. 127a; 736 F.2d at 797). In *Stemple*, the local school authorities had not proposed to change the child's placement for the ensuing year.

parents nor the local school authorities wanted Michael to spend the 1978-1979 school year at the Memorial School. For reasons already given § 1415(e)(3) is rational, but to make a child stay put in a placement that neither the parents nor the local school authorities approve is close to absurd.

Finally, the Court of Appeals found it unnecessary to rule on the contention that the January, 1980 decision was a retroactive agreement that Michael be placed in the Carroll School. Even if the Court had adopted this view, its decision would have been contrary to that of *Mt. View, supra,* at 30. We assume that under the law of contracts an agreement may, if the parties so state, operate retroactively. But the word "agree" cannot be wrenched from the language of § 1415(e)(3). As this Court said in *United States* v. *Morton,* 104 S.Ct. 2769, 2773 (1984): "We do not . . . construe statutory phrases in insolation; we read statutes as a whole." If § 1415(e)(3) permitted parents to "agree" retrospectively, by prevailing at state administrative hearings or perchance by prevailing in proceedings under § 1415(e)(2), it would mean exactly what *Stemple* and other cases[4] have said that it does not mean: that parents may unilaterally place their handicapped children in private schools and hope that somewhere along the way their decision to do so will be "ratified." All of the reasons marshalled against the First Circuit's position that self-help is permissible, see pp. 10-12, *supra,* apply equally to the position that there can be retroactive agreement. Indeed, either position is contrary to 34 C.F.R. § 300.347(a)(1) and (2), which provides that "before" there is a lawful placement in a private school, *i.e.*, one approved by state or local authorities, there must first be

---

[4] The Court of Appeals cited only *Monahan* and *Mt. View* and cases in accord with *Stemple*. However, the Second Circuit in *Vander Malle* v. *Ambach,* 673 F.2d 49, 52 (1982) and the Fifth Circuit in *Stacey G.* v. *Pasadena Independent School Dist., supra,* at 953 indicated in *dictum* that they were prepared to follow *Stemple*. The Fifth Circuit's *dictum* has since become holding. *Marvin H.* v. *Austin Independent School Dist.,* 714 F.2d 1348, 1353-1354 (5th Cir. 1983). See also cases cited at 1353-1354.

a meeting to develop an IEP in which a representative of the private facility participates. No such meeting can occur when parents resort to self-help and hope for retroactive agreement. This Court has just noted that EHA regulations adopted by the Department of Education "are entitled to deference." *Irving Independent School Dist.* v. *Tatro,* 104 S.Ct. 3371, 3377 (1984). Such deference is thwarted by the opinion rendered by the Court of Appeals allowing self-help.

Section 1415(e)(3) also addresses the right to reimbursement in years subsequent to 1979-1980, for which no IEP's were prepared. In *Rowe, supra,* at 118-119, the Court held that where, as here, the decision to continue private education for a handicapped child is the result of a unilateral withdrawal, the same factors that militate against reimbursement immediately after unilateral withdrawal militate against it for later years as well.

Nor is it of any consequence, as the First Circuit, concerned about "cooperative federalism", seemed to think (A. 135a; 736 F.2d at 800), that "Massachusetts regulations require that 'whenever a placement is . . . ordered [by the state agency] . . . such placement shall be made forthwith, without any unnecessary delay.' Mass.Admin.Code tit. 603, § 409.0." Section 1415(e)(3) is clear in stating that the placement shall not be changed during "the pendency of any proceedings conducted pursuant to this section." Plainly proceedings pending in court are proceedings being conducted pursuant to § 1415. If a spirit of "cooperative federalism" means that regulations adopted by the Massachusetts Department of Education can override clear and unambiguous language of a statute enacted by Congress, then at least in the First Circuit, 165 years of jurisprudence with respect to the meaning of the Supremacy Clause of the Constitution has been swept away. See *M'Culloch* v. *Maryland,* 4 Wheat. 316, 433-436 (1819); *United States* v. *Gillock,* 445 U.S. 360, 373 (1980).

II. If Massachusetts Has a Policy of Punishing Local School Authorities Who Deviate from State-Mandated Standards for the Education of a Handicapped Child by Requiring Them at Their Expense to Educate Such a Child in Private Schools, That Policy Conflicts With EHA and Is Unenforceable.

Underlying the Opinion of the Court of Appeals insofar as it is adverse to Petitioners, is the view that Massachusetts provides enforceable procedural and substantive rights for a learning-disabled child independent of federal law (A. 93a-94a, 95a-105a, 105a-120a, 133a-137a; 736 F.2d at 780-781, 782-785, 786-793, 799-801). We assume that a state may, without specific federal authorization, adopt and implement policies for the education of handicapped children as long as these policies do not directly or indirectly contravene Federal law or regulation. Here, the Court of Appeals, apparently proceeding from no other or better authority than the hearing officer's decision, ruled that under Massachusetts law where local school authorities have in their treatment of a handicapped child deviated in the past from state-mandated policies, they may, even though they have prepared an IEP that assures the child a future free appropriate education in a public school, be compelled to pay for that child's education in a private school selected by the parents.[5]

---

[5] The factual underpinnings for this rule are almost totally lacking in this case. The opinion below discusses Petitioners' "deviations" in rather summary form (A. 103a-105a, 106a-107a; 736 F.2d at 786-787, 789-790). At trial Petitioners' expert on learning disabilities testified without contradiction that these deviations were trivial. All of them were totally explained by the circumstances.

Moreover, Massachusetts has no such rule. In *Isgur* v. *School Committee of Newton*, 9 Mass. App. Ct. 290, 295-298 (1980) there had been a very substantial violation of the right of a learning-disabled child: the right to have a core evaluation. The violation in *Isgur*, it will be noted, applied to the 1975-1976 school year, the very year in issue in that case. *Id.* at 291. Nothing in *Isgur* suggests that previous violations under Massachusetts law would be at all relevant to the issue of future placement. Indeed, the *Isgur* court went even further, it *denied* relief to the child's parents for reimbursement for private

If Massachusetts had adopted such a rule, see n.5, *supra*, it would conflict with Federal law. Congress has required that handicapped children be, as far as possible, educated as they would be if they were not handicapped. 20 U.S.C. §§ 1412(5)(B) and 1414(a)(C)(iv). Federal regulations require that as far as possible handicapped children be mainstreamed, *i.e.*, educated with nonhandicapped children, 34 C.F.R. § 300.550(b)(1). Requiring local school authorities to pay for their past "transgressions" toward a handicapped child, even where (as is not the case here) they are serious, by providing him with a free *private* school education is plainly contrary to the intention of EHA.[6] This would be true even where the past transgressions involved deviations from federally-mandated standards. Deviations from state-mandated standards are *a fortiori*. The statement by the Court of Appeals that "there is no claim of federal preemption" (A. 104a; 736 F.2d at 786) is contrary to arguments that were plainly made in Petitioners' brief, pp. 24-28, and pointed out again their petition for rehearing, pp. 1-9.

States are not free to adopt policies that conflict with Federal statutes, *United States* v. *Gillock*, *supra*, or Federal regulations,

---

education for the ensuing year because it found that the child had not been prejudiced by the violation, serious as it was, *id.* at 298-301. The precise holding of *Isgur* notwithstanding, the Court of Appeals ruled that under Massachusetts law it was irrelevant whether the so-called deviations had resulted in prejudice to Michael (A. 104a-105a; 736 F.2d at 876, n.14).

[6] To be sure, one could imagine, if not actually cite, cases in which local school authorities over a period of time act in such bad faith toward a handicapped child that no matter how good an IEP looks on paper, reviewing agencies are entitled to doubt that the IEP will actually be implemented. Indeed, although the opinion below makes little mention of this, fear that Petitioners would not "implement" the June, 1979 IEP was supposedly one of the major factors that impelled the hearing officer to require Petitioners to educate Michael privately (A. 13a). The District Court gave careful consideration to the hearing officer's insinuations and found that the IEP not only would have given Michael a free appropriate education (A. 62a-63a) but also that Petitioners would have implemented it (A. 63a, 66a). The District Court heard testimony from virtually every teacher and administrator employed by Petitioners who would have had any part in seeing that the IEP was implemented (A. 58a).

Capital Cities Cable Inc. v. *Crisp*, 104 S.Ct. 2694, 2700 (1984). Where federal law requires that a handicapped child be educated in the least restrictive placement with the greatest possible opportunity for mainstreaming, deviations from state procedural or substantive requirements, however well intentioned these requirements may be, cannot become the fulcrum by which federal law is overthrown. Whether, as the court below ruled, "states are free to elaborate procedural and substantive protections for the disabled child that are more stringent than those contained in the Act" (A. 102a; 736 F.2d at 784-785), such "protections" cannot become the basis for repealing an explicit Federal policy. Once the District Court found that Petitioners had drawn an IEP for Michael that would have given him a free appropriate public education in a setting less restrictive and with greater opportunity for "mainstreaming" than that selected by the parents and upheld by the hearing officer,[7] it rightly gave no further consideration to the past "deviations" found by the hearing officer.[8]

III. The Restrictions Placed by the Court of Appeals on the Rights of Parties to Offer Evidence Are Erroneous.

Throughout the judicial proceedings, Respondent Department of Education took the position that the parties could not

---

[7] Not only was the Carroll School a far more restrictive setting than Pine Glen, but there was uncontradicted evidence that Michael in his three years there did not progress better academically than he had in his three years at Memorial School. As already noted, the District Court found that there was no doubt about Petitioners' determination and ability to implement their IEP (A. 62a-63a, 66a).

[8] Nor was the District Court required to choose between supposedly conflicting diagnoses (A. 119a-120a; 736 F.2d at 793) in the absence of any evidence that such a choice would have affected Michael's placement in 1979-1980 or in subsequent years. Compare *Anderson* v. *Thompson*, 495 F.Supp. 1256, 1263 (E.D. Wis. 1980).

offer evidence other than the transcripts and exhibits of the BSEA hearing. The District Court was not persuaded by this argument, though its pre-trial order directed the parties not to repeat the evidence already in the administrative transcripts (A. 49a, 54a). As we have already noted, both Petitioners and the parents presented numerous witnesses at trial, and their testimony was received over the Department's objection.

On appeal from the District Court's judgment, the Department continued to press its objections and the opinion below first states on this point (A. 114a; 736 F.2d at 790).

> We decline to adopt the rule urged by defendants that the appropriate construction is to disallow testimony from all who did, or could have, testified before the administrative hearing.

It then goes on to say (A. 115a; 736 F.2d at 791);

> A practicable approach, we believe, is that an administrative hearing witness is rebuttably presumed to be foreclosed from testifying at trial. A motion may then be made to allow such a witness to testify within specified limits stating the justification for the testimony. In ruling on the motions [for witnesses to testify],[9] a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources.

It would appear that in requiring the District Court to rule on a motion to permit persons who testified at the administrative

---

[9]The bracketed words were added by the order denying the petition for rehearing (A. 148a).

hearing to testify at trial, the Court of Appeals set forth criteria to be applied in ruling on whether persons who did not testify at the administrative hearing should be permitted to testify at trial. There seems to be logical gap between the beginning and the end of the last quoted paragraph.

In any event, we suggest that the view taken by the District Court was essentially correct[10] and that for several reasons its ruling on this point should stand. One is that the decision of a hearing officer when it is the subject of a § 1415(e)(2) action, especially if it is given "due weight" (A. 116a; 736 F.2d at 791), ought to become the "whetstone" that sharpens the positions of both its attackers and defenders. If witnesses who testified at the administrative hearing are debarred from testifying in court, the review might just as well be confined to the record and permit reversal only because the decision was unsupported by substantial evidence or otherwise tainted by error of law. If witnesses who could have testified but did not are debarred, the result is *a fortiori*. *Burlington I*, 655 F.2d at 431 (1981), totally repudiated such review, and this Court in *Hendrick Hudson District Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 206 (1982), has shown that it was correct to do so. Another reason is that a court cannot carry out the legislative mandate to decide a case by the "preponderance of the evidence," 20 U.S.C. § 1415(e)(2), unless it has the opportunity to judge the credibility of the testimonial evidence. Yet a third reason is that if there is any significant delay between the administrative hearing and the trial, at least some of the same witnesses will be required to update their testimony. A fourth reason is that motions of the type contemplated by the First Circuit are likely to consume an inordinate amount of time of both lawyers and the district court not to mention, ultimately the Court of Appeals; a fifth reason is that the discretionary aspect of such

[10] Even that rule may be slightly too confining in the context of a trial. A court is not a computer and where, as here, there are 850 pages of administrative testimony, the District Court, even if it has read this testimony in advance of trial, is unlikely to recall it *in toto*.

motions is likely to result in widely different practices from judge to judge, ranging from routine allowance to routine denial of such motions. Such differences in practice will mean that in theory the same case would be decided differently, depending on whether or not the District Court was willing to let the persons who testified at the administrative hearing testify at trial.

The First Circuit did not cite a single case for the restrictions that it placed on the right of parties to offer evidence to the District Court. Other courts have simply assumed that evidence is admissible. See *e.g.*, *Kruelle* v. *New Castle County School Dist.*, 642 F.2d 687, 690 (3d Cir. 1981); *Age* v. *Bullitt County Public Schools*, 673 F.2d 141, 143 (6th Cir. 1982). The expressed fear that allowing witnesses who testified or could have testified at the administrative hearings to testify in court would turn § 1415(e)(2) proceedings into trial *de novo* (A. 115a; 736 F.2d at 791), *i.e.*, a trial in which the judge occupied the same role as the hearing officer, is unfounded. Courts can and do hear admissible evidence freely in cases in which they are nevertheless required to defer to executive or legislative decisions. See, *e.g.*, *Board of Education, Island Trees Union Free School District* v. *Pico*, 102 S.Ct. 2799, 2809, 2812 (1982); *Minersville District* v. *Gobitis*, 310 U.S. 586, 592 (1940). In § 1415(e)(2) cases, "due weight" can and should be given to state educational decisions not by restricting the right of the parties to offer evidence but by wise limitations on the use of that evidence once it is offered.[11]

---

[11] Such limitations would begin, if not end, with deference to Federal and State policies concerning the means of educating handicapped children. For example, the First Circuit in this case should not have used its "expertise" to decide questions of educational policy (A. 119a-120a, 130a-131a; 736 F.2d at 793, 798).

IV. The Court of Appeals Should Have Applied the Doctrine of Law of the Case and Ruled on the Basis of *Burlington I* That Petitioners, as Prevailing Parties, Were Entitled to Be Reimbursed by the Parents for Amounts Expended on Michael's Tuition and Related Expenses.

One question before the Court of Appeals in *Burlington I* related to who should finance Michael's education at the Carroll School while proceedings continued in the District Court.[12] Respondents and the District Court took the position that Petitioners should pay until the case could be decided; Petitioners, although agreeing under duress to make payments from February of 1981 onward, took the position that they should have no responsibility for such payments. Judge Coffin's decision in *Burlington I* split the difference, so to speak. He held that Petitioners should continue to pay the costs until the case was over, but need not reimburse the parents for tuition and related expenses paid to the Carroll School prior to February of 1981. His reasoning was clear: neither Petitioners nor the parents had shown the threat of irreparable damage that were a prerequisite to interim relief. If Respondents prevailed, Petitioners could certainly reimburse them. To Petitioners' expressed doubts that the converse was also true, the Court replied that it found little reason to doubt Petitioners' "ability in the event of its ultimate victory, to collect a $7,400 judgment against an individual that the record shows to be employed by the federal government as a professional in a supervisory position" (A. 45a; 655 F.2d at 433). Plainly, the Court's entire theory on this aspect of the case was that the losing party would and could reimburse the prevailing party after a trial on the merits (A. 43a-47a; 655 F.2d at 432-434).

There was a trial and Petitioners prevailed. Judge Aldrich, to whom the issue of reimbursement was referred, ruled that

[12] Plainly the parents at this time had no intention of withdrawing Michael from the Carroll School.

the Panicos should reimburse Petitioners for the funds received from February of 1981 through June of 1982 (A. 82a-85a; 561 F. Supp. at 129-130), though for inexplicable reasons he ruled that they did not have to reimburse Petitioners for funds received from the Commonwealth of Massachusetts toward Michael's education (A. 86a; 561 F. Supp. 130).

Although one might hardly guess this from the opinion below, Petitioners argued at length in their brief that the doctrine of law of the case required the Court of Appeals to adhere to its earlier decision that the prevailing party should be reimbursed *in toto*. Of course, the Court of Appeals decided that perhaps Petitioners should not have prevailed since the District Court had erred in the manner in which it arrived at its decision. We take up the cudgels against those aspects of the lower court's opinion elsewhere in this petition.

But the Court of Appeals went further and held that even if Petitioners again prevail after further proceedings in the District Court, they will be absolutely liable for tuition and related expenses for the period from January 31, 1980 to the end of the 1979-1980 school year and possibly liable for tuition and expenses incurred thereafter (A. 135a-138a; 736 F.2d at 800-802). The Court gave no reason for departing from the law of the case founded upon *Burlington I*. The failure to offer any reason requires reversal of the judgment. Although the doctrine of law of the case may not be as inexorable as *res judicata*, see *Moore* v. *Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982), virtually every Circuit that has considered the issue has ruled that there should be no departure from the law of the case except for the weightiest reasons fully expressed. To quote the Fifth Circuit in *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 19-20 (5th Cir. 1974), *cert. denied*, 419 U.S. 987 (1974), the doctrine is "waived for only the most cogent of reasons and to avoid manifest injustice." Accord: *Carpa Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316, 1320 (5th Cir. 1978). In this case the First Circuit did not give cogent reasons or any reasons at all for departing from the holding of *Burlington I*.

V. Even Apart from the Doctrine of Law of the Case, Respondent Panicos are Not Entitled to Damages.

Departing from the holding of virtually every other circuit to consider the issue (except perhaps the Seventh Circuit), the First Circuit in effect held that parents of a handicapped child who does not receive a free appropriate public education are in some circumstances entitled to damages under EHA (A. 133a-138a; 736 F.2d at 799-801). Compare *Marvin H.* v. *Austin Independent School Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983); *Mountain View-Los Altos Union High School Dist.* v. *Sharron B.H.*, *supra*, at 30; *Powell* v. *Defore*, 699 F.2d 1078, 1081 (11th Cir. 1983); *Miener* v. *Missouri*, 673 F.2d 969, 979 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 215 (1982). At one time the First Circuit took the same position as is taken in the other circuits. *Doe* v. *Anrig*, 692 F.2d 800, 812 (1st Cir. 1982); *Colin K.* v. *Schmidt*, 715 F.2d 1, 10 (1st Cir. 1983). However, in *Doe* v. *Brookline School Committee*, 722 F.2d 910, 917, 919-920 (1st Cir. 1983) another panel of the First Circuit, not sitting en banc, compare *County of Monroe, Florida* v. *U.S. Dept. of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982), "overruled" *Doe* v. *Anrig I*, and effectively started that court on the less "constricted" road toward damages.[13] In

---

[13] In that case less "constricted" than the view taken in *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981). The *dictum* in *Anderson*, *supra*, 1214 concerning when damages may be appropriate has become the "wild ass" of EHA law. The case has been cited for diametrically opposite positions. Compare *Miener* v. *Missouri*, *supra*, at 979 (stating that *Anderson* allows no damages under EHA) with *Doe* v. *Brookline School Comm.*, *supra*, at 919 (finding *Anderson's* interpretation of right to damages under EHA "constricted") with the First Circuit's opinion in the case at bar (A. 138a; 736 F.2d at 802) (allegedly following *Anderson*). That Judge Swygert sat on the panel that decided the present case on its most recent journey through the First Circuit does not alter the difficulty of applying the *Anderson* holding. *Anderson* ought to be considered a superb example of why courts should refrain from discussing issues not actually before them. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755 *reh. denied*, 392 U.S. 917 (1968).

this case the First Circuit decided that reimbursement, *i.e.*, damages,[14] could be awarded to the parents, either through an affirmative order to repay or by absolving the parents from repaying sums received from Petitioners (A. 133a-138a; 736 F.2d at 799-802). With respect to tuition and related expenses for the period from January 30, 1980 to the end of the 1979-1980 school year, it ruled that the parents' right to damages was absolute (A. 135a-136a; 736 F.2d 800-801), reasoning, although all the evidence is to the contrary, that the parents had relied or could have relied on the hearing officer's decision.[15] With respect to damages for periods prior or subsequent to the last five months of the 1979-1980 school year, the Court held that Petitioners may end up paying damages if (a) the District Court finds that procedural "violations" enumerated by the hearing officer were "serious" (A. 138a; 736 F.2d at 802) or (b) other "equitable" considerations indicate that the parents should receive damages (A. 133a-137a; 736 F.2d at 799-801). The only "equitable consideration" squarely identified in the opinion was "whether parents made a specific proposal for a private placement and attempted in good faith to gain an agreement with the school system before moving the child"[16] (A. 133a; 736 F.2d at 799).

---

[14] See, *e.g.*, *Anderson* v. *Thompson*, *supra*, at 1209.

[15] Not only was Michael's placement in the Carroll School the unilateral act of his parents but they also kept him there in years subsequent to 1979-1980 and refused to cooperate in preparing an IEP for those years. See Argument VI, *infra*.

[16] The parents offered no evidence at the administrative hearing or trial that they made a specific proposal and attempted in good faith to gain an agreement before making the move. At the administrative hearing, Mr. Panico gave a detailed chronology of Michael's problems in the Town's public schools and of his responses to those problems. The chronology spanned the period from the spring of 1977 to the late summer of 1979, but there was no mention of any effort to reach agreement concerning placement in the Carroll School. If evidence of efforts to gain an agreement was relevant, the parents ought to have offered it at trial or at least at one of the post-trial hearings on the subject of damages. A remand to develop a factual position advanced neither at trial nor on appeal is, to say the least, anomalous. See *Whittaker Corp.* v. *Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984).

Perhaps there is no clearer indication of how right the *Stemple* court was than the tortuous path taken by the First Circuit in its efforts to arrive at the meaning of § 1415(e)(3). *Stemple's* bright red line prohibiting self-help not only effectuates the language of Congress, see Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892, 894-895 (1982), but avoids the Byzantine distinctions that are likely to follow the First Circuit's opinion as district courts try to determine when damages may or may not be awarded. To speak of awarding damages on the basis of discretionary equitable considerations is virtually to stand Anglo-American jurisprudence on its head. Damages, even in courts of equity are, when proven and allowable, traditionally a matter of right, not a discretionary balancing of equitable considerations. See, *e.g.*, Note, The Right to Jury Trial In Enforcement Actions Under Section 502(a)(1)(B) of ERISA, 96 Harv. L. Rev. 737, 752-753 (1983). Moreover, that the court below was able to locate only one such equitable consideration, whether a parent had made a proposal and tried to get local school authorities to agree to it, is indicative that such considerations are difficult to locate, much less apply. Nor does the First Circuit explain why parents who try to bring local school authorities around to their proposals are behaving more equitably than parents who simply carry out their proposals as did the Panicos and then seek relief. Yet another problem with this particular consideration is that it may, in many cases, be impossible to determine where attempting in good faith to gain agreement ends and settlement negotiations begin. The latter are plainly not a subject for the court's consideration, ever. Rule 408 of the Federal Rules of Evidence.

Nor should even serious procedural violations of State- or federally-mandated rights of a handicapped child give rise to a cause of action for damages. Contrary to the explicit view taken by the First Circuit (A. 104a-105a; 736 F.2d at 786, n.14), procedural violations are meaningless in the absence of evidence that these violations resulted in harm to the child.

See n.5, *supra*. It has been almost invariably true that when this Court has found that a Federal statute or regulatory scheme creates a private remedy for damages, the remedy is restricted to one who can prove that there has been a breach of a statutory duty *and* that he has been damaged in consequence of that breach. *E.g., Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916). On the other hand, if there has been a serious breach of the duty owed by local school authorities to a child under EHA, the child is being immediately harmed by that breach, and the administrative remedies are inadequate to deal with that harm, the relief lies not in self-help and compensatory damages but in immediate recourse to the injunctive powers of a state or Federal court. *Stock* v. *Massachusetts Hospital School, supra*. The ultimate issue in any case in which the parents reject an IEP calling for public school placement is whether the rejected IEP offered the child a free, appropriate public education. If it does, and the District Court here found that the IEP rejected by the parents certainly did (A. 62a-63a, 66a), local school authorities cannot be expected to fund expensive private school education to vindicate an erroneous choice made by the parents. Even when a rejected IEP does not offer an appropriate education and the conditions for injunctive relief are not met, the remedies provided by EHA and corresponding provisions of State law should prove adequate.[17]

We finally approach the issue of whether damages are appropriate to reimburse the parents for a period during which a child is in a placement selected by them, approved by BSEA, but on judicial review found to be less desirable than that selected by local school authorities. Again, if *Stemple* is controlling, damages are not appropriate. Even if *Stemple* is not

---

[17] 603 C.M.R. 403.0 requires BSEA to decide appeals in twenty-five days. Although it has been held that the failure to act within that time does not deprive BSEA of jurisdiction, *Amherst-Pelham Regional School Committee* v. *Department of Education*, 376 Mass. 480, 496-497 (1978), a judgment in the nature of a writ of mandamus would almost certainly issue to compel BSEA to decide an appeal within the time required by law. *Rea* v. *Aldermen of Everett*, 217 Mass. 427, 428, 430-432 (1914).

controlling, the First Circuit was, we suggest, wrong. What § 1415(e)(3) requires before there can be change of placement is not merely that the parents have convinced the person conducting the due process hearing, § 1415(c)-(e), that the rejected IEP was inappropriate, but that state or local school authorities agree with the parents to a changed placement pending judicial review. In this case no such agreement was ever called to the District Court's attention. The fair assumption is that in fact it never was obtained.[18]

The reason for not awarding damages under EHA was plainly stated in *Mt. View, supra*, 709 F.2d at 30, from which we quote:

> Damage remedies for placement before full compliance with EAHCA procedures are not in keeping with the design of the Act. A damage action is usually associated with the breach of some duty, or creation of an unusual risk as by engaging in an ultrahazardous activity. Damages serve not merely to compensate an injured party but also act as an incentive for potential defendants to act prudently. See, *e.g.*, 42 U.S.C. § 1983. Damages under EAHCA would serve no purpose. The prudent school

---

[18] Perhaps for the reason that Massachusetts does not seem to have provided for state-authorized agreements to change the placement after administrative hearings have been completed. Compare 603 CMR 327.1 (allowing for good cause change of placement of child in regular program on request of parents or school committee pending administrative proceedings). But see 603 CMR 327.2 (placement of child, like Michael, in special education program should, pending administrative proceedings, be in regular program at parents' request, which is subject to review at the behest of the school committee). There appears to be no provision for state authorities to agree to place a child who is already in a special education program in a different special education program while administrative or judicial proceedings are pending. Massachusetts General Laws c. 71B, § 10 seems to address only the situation in which both the parents and the school committee agree on private education. It may be that Massachusetts has adopted no regulations providing for State agreements with parents concerning placement pending § 1415(e)(2) proceedings because it takes the position, see 603 CMR 409.0, that immediate implementation of administrative decisions is required. That position, however, is in conflict with federal law. See Argument II, *supra*.

> district need not do more than faithfully apply the procedures of EAHCA. The threat of damages in a case like ours would not make compliance any more likely, and would subject school districts to contingent liabilities hardly foreseeable when the annual school budget is prepared.

The First Circuit's award of damages in this case should, therefore, be reversed.

VI. Where the Parents Were Very Clear that They Would Not Cooperate in Any Effort to Compose an IEP for the Years Subsequent to 1979-1980, They Are Not Entitled to any Reimbursement for Monies Spent on Private Education for Those Years.

The First Circuit accepted the contention made by Petitioners in their brief that local school authorities should continue to prepare an IEP for a handicapped child while review proceedings are pending (A. 122a; 736 F.2d at 794). It also recognized that no IEP for a subsequent year to 1979-1980 was prepared in the present case but that Petitioners had attempted to carry out a ten-month evaluation[19] and the parents refused to make Michael available for such an evaluation (A. 121a, 122a; 736 F.2d at 794-795). After this recognition, at A. 123a; 736 F.2d at 795, the Court makes a most remarkable statement, which we quote:

> The regulations plainly prescribe that IEP review shall occur regardless of whether parents participate or whether a reevaluation of the child occurs. The Town's IEP responsibilities were therefore not excused by the parents' refusal to make [the child] available, and accordingly no advantage should accrue to the Town by dint of its failure to prepare IEPs during the subsequent years of this litigation.

---

[19] A ten-month evaluation may lead to an amended IEP. 603 CMR 333 *et seq*.

It does not say how Petitioners could have prepared an IEP for Michael when his parents not only refused to make him available for any evaluation but also declined to furnish any of his records at the Carroll School.[20]

We are constrained to say that the First Circuit fudges the record on this point. It is true that Petitioners never specifically mentioned an IEP in talking about a ten-month evaluation. On the other hand, it is equally true that the Panicos, through their attorney, on August 21, 1980 responded by saying that they would not provide Petitioners with "reports or other information." Four months later, on December 7, 1980, the Panicos again addressed this issue through their attorney demanding that an IEP be drawn. They even offered to make records available to help Petitioners to draw an IEP. However, a condition attached to the offer was that "the persons compiling the information and drafting the plan be not adversaries in any court proceeding or under the influence of an adversary." In other words, no employee of or consultant to the Burlington public schools could participate in drawing an IEP. Petitioners rejected any scheme under which, in order to draw an IEP for Michael, they would effectively have had to hire a team that had no connection with their public schools. To justify that rejection one need not look beyond the point that the type of "team" demanded by the parents would have violated state and Federal law. 34 CFR 300.347(a) and 603 CMR 311.0 *et seq.*

It is a perhaps universal truism of administrative law that parties who decline to comply with the "housekeeping" rules

---

[20] At 736 F.2d at 795, n.27 (A. 123a), the Court suggests that Rule 35 of the Federal Rules of Civil Procedure might be used by school authorities in litigation with parents to obtain the information needed to prepare an IEP. Congress could not have shared this thought since it allowed § 1415(e)(2) actions to be brought in state courts including those that might not provide for Rule 35-type examinations. Beyond that, the First Circuit's suggestion is shocking. The purpose of the discovery rules is preparation for summary judgment or trial, and they should be used for no other purpose. *Cf. Joy* v. *North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Baldwin* v. *Joy* and *Citytrust* v. *Joy*, 103 S.Ct. 1498 (1983).

prescribed by or for agencies forfeit their rights to the benefits that such agencies might otherwise be obligated to confer. See *e.g., Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981); *MacDonald* v. *Board of Assessors of Mashpee*, 381 Mass. 724, 725 (1980) (*dictum*). As *Schweiker* indicates, the forfeiture may result even when the noncompliance is plainly inadvertent. But there was nothing inadvertent about the Panicos' refusal to allow Petitioners to prepare a lawful IEP. Instead, their position seems to have been adopted as a strategy of litigation designed to keep Petitioners from finding out how Michael was progressing at the Carroll School and, perchance, preparing an IEP that would have called for placement other than at the Carroll School. As the First Circuit was compelled to recognize (A. 120a-124a; 736 F.2d at 793-795), the absence of an IEP for years subsequent to 1979-1980 greatly frustrated a judicial determination of what was an appropriate placement after 1979-1980. Having succeeded by their own efforts in frustrating the judicial process, the Panicos are not entitled to damages for expenses incurred in those years.

Conclusion.

For the reasons given, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

DAVID BERMAN,
Counsel of Record,
JANE KENWORTHY LEWIS,
BERMAN AND MOREN,
100 George P. Hassett Drive,
Medford, Massachusetts 02155-3297.
(617) 395-7520
Attorneys for the Petitioners

Appendix.

Table of Contents.

Decision of Massachusetts Department of Education Division of Special Education Bureau of Special Education Appeals, January 31, 1980 1a

Memorandum of decision and judgment of United States District Court, District of Massachusetts, November 19, 1980 28a

Opinion of the United States Court of Appeals for the First Circuit, June 18, 1981 36a

Pretrial order of United States District Court, District of Massachusetts, March 18, 1982 48a

Memorandum of decision of United States District Court, District of Massachusetts, August 13, 1982 57a

Opinion of the United States District Court for the District of Massachusetts, March 7, 1983 69a

Opinion of the United States Court of Appeals for the First Circuit, May 29, 1984 87a

Judgment of the United States Court of Appeals for the First Circuit, entered May 29, 1984 144a

Order of the United States Court of Appeals for the First Circuit, entered June 29, 1984 146a

MASSACHUSETTS DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: Michael P. BSEA # 2867

DECISION

This decision is issued pursuant to the requirements of MGL c. 71E, c. 30A and the regulations thereto.

An educational plan proposed by the Burlington Public Schools for Michael P. and rejected by his parents was the subject of hearing on September 26, October 30, 31, and November 1, 1979 convened at the Administration Building of the Burlington Public Schools, Burlington Massachusetts. The record remained open for receipt of closing statements and was closed on November 30, 1979.

Unless otherwise noted, the following persons attended on the above dates:

Gerald B. Gallagher	— Attorney for Parents
Evelyn Doherty	— Advocate, Federation for Children
Robert P.	— Father
Roseann P.	— Mother
Ira T. Lott, M.D.	— Pediatric Neurologist, M.G.H. (9-26)
Katherine Black	— Learning Disabilities Tutor (9-26)
Sharon Marsh	— Education Director, Carroll School (10-31)
Aaron Berman	— Town Counsel, Burlington (9-26, 10-31)
Colette Manoil	— Town Counsel, Burlington (10-30, 31 and 11-1)

Kevin Foley	— Director of Pupil Personnel Services, Burlington
Jean Arin	— Team Evaluation Administrator, Burlington
Patricia Meade	— Language Pathologist, Burlington (9-26, 10-30, 31)
John McAleer	— Generic Specialist, Burlington
Gail Mason	— Learning Center Specialist, Burlington (9-26, 10-30, 31)
Thomas Michael	— Superintendent of Schools, Burlington (11-1)
Deborah D. Blumer	— Hearing Officer, BSEA

ISSUES

1. Whether the educational plan and placement proposed by the Burlington Public Schools, a 502.4 prototype at the Pine Glen School, is adequate and appropriate to meet Michael's special needs.
2. Whether the Burlington Public Schools have violated the procedural requirements of Ch. 766 in significant and prejudicial ways.
3. Whether, in the alternative, the Carroll School, a 766 approved private day school is the least restrictive, adequate program and placement which meets Michael's special educational needs.
4. Whether, Burlington Public Schools is responsible for payment of certain evaluations.

PRELIMINARY STATEMENT

Michael is a nine year old boy who had attended the Memorial School in Burlington for grades kindergarten through three. He received remedial reading assistance through the school's

Title I program in grades one and two. Burlington wrote an IEP in March 1978, during Michael's second grade year. The plan (502.2 prototype) provided individual reading instruction with Ms. Black, a special educator trained in learning disabilities, and small and large group counseling with Ms. Fourn the school's guidance counselor. Said plan remained in effect through June, 1979. A new IEP (502.4 prototype) for 1979-1980 recommended transfer to the Pine Glen School in Burlington and placement in Mr. McAleer's classroom for all academic instruction. Michael's parents rejected the plan and enrolled him in the Carroll School, a 766 approved private day school in September, 1979.

ANALYSIS OF THE EVIDENCE

This Analysis is organized into sub-sections in order to focus more clearly on the nature of Michael's special needs, the adequacy of Burlington's educational plan and issues of compliance with law and regulation. The record includes more than 80 separate exhibits and approximately 18 hours of testimony.

I. Nature of the Student's Special Needs

Parties substantially agree on several points:

1. Michael has a learning disability and reading disability (stipulation).
2. Despite provision for special education services, Michael has not made sufficient progress in reading (testimony, Ms. Arin, Ms. Black, Dr. Lott, parents).
3. Michael is unable to apply previously learned skills in reading to daily classroom performance on a consistent basis (testimony, Ms. Arin, Ms. Black).

4. Michael had been achieving at or above grade level mathematics; recent test results show some regression (Teacher report, Spring 1979 test results).
5. Michael has "above average" to "superior" intelligence, according to testing, with no significant difference in verbal and performance scores (S-3, S-15).
6. Michael is easily distracted (Teacher report, assessments).
7. Michael needs a structured, supportive, small group learning environment with strong teacher supervision (testimony, Ms. Arin, Mr. and Mrs. P.; Report, Mr. Kavanaugh, S-38).

School records and parent testimony show that Michael enjoys sports and the outdoors and takes pride in those areas where he is successful. Dr. Lott, pediatric neurologist and Massachusetts General Hospital (MGH) testified that Michael is "neurologically immature" in areas "subserving the function of reading." He characterized Michael's learning disability as "severe," based on Michael's slow progress given his general intelligence.

School assessments in June, 1977, do not identify any significant learning disability, although relative weaknesses were found (S-3). In January 1978, MGH testing at the Cortical Function Test Laboratory (CFTL) found evidence of crossed dominance, left-right confusion, reversals and difficulties in sequential memory (S-15). School evaluations in Spring 1979 report "a possible deficit in Michael's short term memory abilities may be interfering with his academic performance (S-37, pp. 90-99). Although a 1977 evaluation by the school recommended "materials should be taught visually whenever possible," (S-3), the school in 1979 noted a "question of visual memory problem that may interfere with academic progress" (S-37, pp. 100-105).

Burlington in May, 1977 recommended that Michael be retained in grade one (prior to any 766 evaluation), citing "overall immaturity" (P-2,11). Yet, Mr. Kavanaugh, school

psychologist, evaluated Michael in June 1977 and wrote: "Michael's responses to most items (on sentence completion projective tests) were typical for a boy of his age. . ." He noted some immaturity in attitude toward possessions, but concluded that "emotional issues in and of themselves should not affect his academic performance" (S-3). Mr. Kavanaugh's May, 1979 re-evaluation of Michael showed significantly increased concern about Michael's emotional growth, despite less than ideal test conditions.

> Michael perceives expectations for his performance, especially in the academic area, that he does not feel he can meet. He becomes anxious and because of this and depression he has difficulty focusing his attention on the task and exerting enough energy to meet success (S-38, pp. 105-106).

Dr. Eisenthal, psychologist at MGH, conducted a further evaluation in early summer 1979. He found Michael's "response to achievement stimuli was positive, but somewhat passive . . . Michael is . . . somewhat anxious . . . somewhat immature . . . his current difficulties in reading do not seem to be affected in a significant way by personality difficulties" (S-64, pp. 81).

The phrases "distractibility," "difficulty in attending to task" pervade the classroom performance reports from kindergarten onward (S-73-82); instances of inattention were found by evaluators at MGH and Burlington, even though no external stimuli were present (S-3, S-15). Parties agree that Michael is "unusually susceptible" (in Dr. Lott's words) to losing concentration. There is further agreement that Michael needs close supervision to control his distractibility and that he does not work well independently (S-15, S-35, pp. 78-82).

Early reports indicate the environment most conducive to Michael's learning was one-to-one for brief periods (S-3); later

reports suggest small group learning (S-35, pp. 78-82). Dr. Lott testified that Michael can learn in a small group setting and that one-to-one instruction is not essential.

A review of academic achievement testing supports the agreement of parties that Michael's progress was insufficient and that the gap between actual grade level and performance was increasing. At the end of the first grade, he was reading at "preprimer" to "primer" levels, with grade level math skills. His skill level in phonics is unclear (S-3). At mid-second grade, scores from MGH show early second grade equivalence in word reading, paragraph meaning; oral reading and dictated spelling (S-15). California Test of Basic Skills scores in April of the second grade indicate beginning second grade reading scores with mathematics scores at grade level. Other tests were administered, but the record is unclear as to dates and test conditions (S-25, 34). In Spring of grade three, scores are scattered from late first to mid second grade levels skills in reading comprehension, word recognition, oral reading, and spelling; Michael achieved at 3.3 grade equivalency (34%ile) in mathematics (S-37, pp. 88; S-37, pp. 102; S-83, pp. 208). It should be noted that scores stem from various instruments, making precise comparison impossible. Ms. Black testified that she did not conform to testing conventions in her administration of the Spache Diagnostic Test.

II. Evidence of Adequacy of the Educational Plan for 1979-1980

Ms. Arin, Core Evaluation Coordinator testified that she wrote the educational plan for Michael incorporating all of the available information. Neither Dr. Lott's most recent written report nor Dr. Eisenthals' psychological report were ready in late June, but neither would have required a change in the plan, according to Arin. The plan, Arin said, provides a "highly

structured academic program" within a supportive environment aimed at helping Michael find success in academics as well as addressing behavioral issues. She was concerned about Michael's "limited progress." Ms. Arin stated that other (i.e. less restrictive) options were not considered for a "combination of factors." Michael's reading disability was "more pronounced," with the gap between his performance and grade level growing; Michael's emotional state and sense of "self worth," had deteriorated. She noted academic testing "seems to indicate some gains," but classroom performance did not show "application of skills to everyday reading."

The parents argued that the plan was deficient in not specifying materials, particular methodologies, three, six, nine month timelines for objectives. Counseling services recommended by a team member were not included. The parents believed the placement recommendation had been governed by Mr. Kavanough's findings and that the placement was designed to deal with students with substantial emotional or behavioral problems.

There is no dispute that the focus of the written plan on reading and related skills is appropriate. The first nine general objectives reflect this emphasis. The parents questioned Burlington's capacity to implement such general objectives within Mr. McAleer's classroom. The question was central to the appeal.

Mr. Foley agreed that in prior years Mr. McAleer's class has been called the "primary adjustment class." This was no longer true, he said. He estimated that 70-75% of the students in the class had some form of "adjustment" need. Ms. Black, the learning disabilities teacher who had worked with Michael for over a year, including an unpaid summer tutorial, testified that the placement was inappropriate for Michael. She based her opinion on participation in the evaluation of another child in the group whose needs, she asserted, conflicted with Michael's.

She had not observed Mr. McAleer's class in any formal way. Neither the psychologists nor Michael's guidance counselor testified.

Mr. P. and Evelyn Doherty advocate observed Mr. McAleer's class in the fall (Mr. P. was scheduled to visit in June, but cancelled the appointment.) Ms. Doherty testified that the environment was "relaxed" and "unpressured" that children gained Mr. McAleer's almost immediate attention. Both she and Mr. P. observed play activities and other behavior they thought distracted one child and would distract Michael. Ms. Doherty stated that at least one child had needs and educational goals incompatible with Michael's. This view was based both on her review of educational plans for other students in the class and on her observations. Ms. Doherty believed the placement was not academically stimulating for Michael, particularly in view of his greater math skill.

Mr. McAleer stated that the visit of Mr. P. and Ms. Doherty had been distracting to the students and that some students were "acting" for the observers. He strongly disagreed with the view that the needs of current students would not be compatible with Michael's needs. He focused his work on academics, although like other teachers, he structures the environment for emotional and behavioral needs. Mr. McAleer uses a contracting and reward system for both academic and behavioral objectives.

His class enrollment of seven students includes: one child who is totally "mainstreamed" for academic subjects: two children with learning disabilities similar to Michael's — one of whom, a seven year old, would use the same reading program; one child who needs a "reality based" program but is not disruptive, one child who had significant behavioral problems, but whose inappropriate actions have diminished; one child with combination of "perceptual" and "conceptual" difficulties; two students with various combinations of academic and emo-

tional needs. With one exception, the students have average to above average intelligence.

According to the plan, Michael would attend his class for all academic subjects, as well as an affective education component. The daily schedule includes 1½ to 2 hours of reading, with additional time allotted for language arts, spelling, etc. An aide is present during the reading period so that the student/teacher ratio is 3 or 4: 1. Michael would have at least 15 minutes per day one-to-one instruction in reading on average. The parents noted that the previous plan provided one-to-one instruction one hour per day, with one-half hour actually delivered. Mr. McAleer stated that the difference in time was more than compensated by the consistency of the program.

The base of Michael's reading program would be the Helen Grush method; Ms. Black had used the Orton-Gillingham method during the prior year and one-half. Mr. McAleer is not trained in the latter method; He had taught three children in five years with learning disabilities similar to Michael's and had used the Grush method with five children in three years. Michael's reading skills would place him at or near the bottom of the class. Mr. McAleer stated that the highly individualized nature of his instructional program minimizes any student's negative comparison of himself/herself to others.

Mr. Foley and Mr. McAleer testified that the Pine Glen program offered almost immediate potential for integration into regular education class, with mathematics suggested in Michael's case.

Mr. McAleer's class schedule is 15-20 minutes shorter than the regular school day. The records and Mr. McAleer's testimony show no recommendation that Michael needs a shortened day. Mr. McAleer surmised that transportation schedules dictated the time differential. The ages of students in the class span seven to eleven years.

The record includes testimony, written reports and a draft educational plan from the Carroll School. The program provides small group instruction in a language based program. The Orton-Gillingham method is used in reading and language arts instruction. Students are grouped according to age and skill level. Counseling services are available on a consulting basis to teachers or directly to students if needed. Individual tutoring in reading and spelling is accessible as well. Teachers report Michael is highly distractible but that he has responded favorably to firm limits. Ms. Sharon Marsh, Education Director at Carroll testified that Michael has "adjusted very well," is "making friends," and is "completing assignments." She emphasized that it was important to students with learning disabilities "to perceive themselves as like others."

III. Issues of Compliance with Law and Regulation

A. In May 1977, Burlington recommended that Michael be retained in grade one and issued an "educational plan." Parties concur that this was not an educational plan within the meaning of Chapter 766.

B. Parties agree that no educational plan or finding of no special need resulted from the June 1977 core evaluation requested by the parents.

C. The parents contend that in the Fall 1978 a substantive change was made in Michael's education plan without their knowledge or consent. Michael's plan had stated: "Reading — Individual one hour per day" (S-18). Ms. Black and Ms. Mason, Learning Center Teacher, testified that during the period March 1978 — June 1978, Michael worked in the Learning Center with Ms. Black with no other child assigned to Ms. Black for approximately one hour per day. In Fall, 1978, a second child was assigned to Ms. Black for approximately half the period, despite her protests (testimony,

Ms. Black). The parents first learned of the "change" in May, 1979, when informed by Ms. Black. Mr. Foley and Ms. Mason assert Michael's instructional time was not reduced. Ms. Black had always taught Michael directly for one-half hour after which he would work on various materials under her supervision. Ms. Mason noted Michael's distractibility and his distraction of other students. Mr. Foley agrees that there was a "reallocation of Ms. Black's time."

D. In Spring 1979 Ms. Meade and Ms. Mason conducted certain evaluations. They testified these evaluations were not part of an evaluation pursuant to Chapter 766, but were part of retention considerations. The parents contend they were not informed nor gave prior consent for these evaluations. The record does not include any written consent of the parents.

E. In June 1979 Burlington proposed an educational plan for a 502.4 prototype, Ms. Arin desired a full revaluation for Michael and offered to arrange this with evaluators separate from those who had conducted prior assessments. Ultimately she and the parents agreed to Dr. Lott's coordination with MGH staff. Dr. Eisenthal's psychological evaluation is the only further evaluation in the record. Dr. Lott testified that he did review school results with other MGH staff. The record does not include new medical and home assessments. The parents claim these should have been conducted prior to a 502.4 recommendation.

F. Parties concur that there was no one time where all of the school staff involved with Michael's evaluations in Spring 1979 met to discuss his needs. Assessments were shared with the parents at smaller meetings. The parents contend they were not invited to a meeting to write an educational plan.

G. Parties agree that the range of students in Mr. McAleer's class exceeds 36 months. Mr. Foley testified the Regional Office of the Division of Special Education conducted a compliance review during 1978-1979, and did not cite this age

span as a non-compliance issue. Asked whether he had applied, or intended to apply for a waiver of the regulatory maximum age range, Mr. Foley replied "No."

H. The parents contend they were not at the time of their initial request for an evaluation (June, 1977) informed orally or in writing fully as to their rights in the process. Ms. Arin testified that normal procedure was to hand deliver or mail "SPED form 766-6" (a three page or three sided Department of Education Notice of 'Rights of Parents'). To the best of her recollection she had given this to Mrs. P. in June 1977. Ms. Arin testified that she could not recall any further conversations with the parents or transmission of written information about independent evaluations until May, 1979. The parents produced their original document, a one page, single sided sheet.

I. Based on H. above, the parents assert that Burlington is fiscally responsible for certain evaluations conducted by Dr. Melvin Levine, Michael's Pediatrician in June 1977; Dr. Ira Lott on December 16, 1977; the Cortical Function Test Laboratory at Massachusetts General Hospital on January 9, 1978. The school committee asserts it was not given adequate notice of this issue and that the issue before the hearing officer is adequacy the 1979-1980 IEP rather than events of prior years.

SUMMARY OF POSITIONS

School:

1. That the educational plan prepared by the Burlington Public Schools is more than adequate to meet the special needs of Michael P.

2. That the classroom assignment within the IEP is appropriate

3. That the Burlington Public Schools has the capacity to implement the IEP.

4. That Burlington Public Schools has the flexibility to assure modification of the plan to meet changes in educational needs

5. That Carroll School is not the least restrictive adequate placement

6. That issues of financial responsibility for specific evaluations are not properly a subject within this hearing.

Parents:

1. That the educational plan is inadequate to meet Michael's special needs

2. That the educational placement is inappropriate

3. That Burlington does not demonstrate the capacity to provide for Michael's effective educational progress

4. That Burlington is responsible for reimbursement to the parents for expenses of certain evaluations

5. That the Carroll School is the least restrictive, adequate program and placement which can meet Michael's special needs.

CONCLUSIONS AND FINDINGS

A decision in this appeal would be difficult were a determination to rely solely on the adequacy of the 1979-1980 IEP Burlington has proposed for Michael P. The plan provides a radically different program from past efforts that parties agree did not ameliorate Michael's special needs. I might have acceded to Burlington's suggestion to try the new program, had the record supported Burlington's capacity to comply with educational and procedural mandates on Michael's behalf. On the contrary, I find substantive and continuing procedural irregularity. This circumstance combined with doubts that Mr. McAleer's classroom is an appropriate placement, lead me to

conclude that the IEP is inadequate to give reasonable assurance of Michael's educational progress. I further find the Carroll School is the least restrictive adequate program within the record.

THE PLAN

All testimony supports a view that Mr. McAleer is an excellent teacher. My conclusion that placement in Mr. McAleer's classroom is inappropriate is heavily weighted by two factors: (a) Evidence that McAleer has very limited experience in teaching students with Michael's particular learning disabilities and in using the proposed reading methods; (b) Evidence of a lack of a peer group with similar need for a focus on reading objectives and with whom similar teaching methods would be employed.

Mr. McAleer testified that he had taught just three children in five years with learning disabilities similar to Michael's; that he had used the Grush reading method for five children in three years. While he has had several courses in reading, he is not trained in the Orton-Gillingham method. There is no evidence showing a need to change Michael's current instruction in the Orton-Gillingham method. On the other hand, there is testimony from Ms. Black and Mr. McAleer that Michael would benefit from consistency. Michael has a history of slow progress in reading, even though he worked with reading and learning disabilities specialists. Massachusetts General Hospital staff additionally state a need for assistance through specialists skilled and experienced in learning disabilities (P-29, 30, 31).

Considerable testimony centered on the student composition within Mr. McAleer's class in relation to Michael's needs.

> The grouping of children in each program shall be compatible with the methods and goals stated in each child's IEP. (§ 502.4(d), Ch. 766 regulations)."

Parties have stipulated that Michael has a learning disability in the area of reading and related language arts skills. In finding that a peer group with similar needs is important to Michael, I am influenced by the most recent teacher reports stating that the setting most conducive to Michael's learning is small group instruction, that Michael "does not work well independently" and needs ample supervision to complete work (S-p.79). Dr. Lott testified that Michael can learn in a small group. Myra Fournier reported that Michael is highly competitive. Mr. Kavanaugh and Dr. Eisenthal noted Michael's motivation for academic performance is not strong; Ms. Black and others cited his self-esteem needs and awareness of his reading deficits. Parties agree that Michael did not progress sufficiently with a highly individualized program with Ms. Black. A small group reading program composed of students with similar disabilities and achievement levels would, I find provide an environment where Michael can experience success and can channel his competitive urges into active, positive motivation toward academic learning. Mr. McAleer's reading instructional program is highly individualized. Although several students have reading deficits, Michael's skills are lower than five of six students, and only one child uses the same reading materials. Just two children have learning disabilities. It seems clear that Michael would not have an opportunity for extensive group work in reading within the class. Even if a group structure were possible, the skill variance among students might have the effect of increasing Michael's frustration. I am additionally concerned that a highly individualized program may not be appropriate for a student who does not work well independently.

I note Michael's greater skill in mathematics and the school committee offer to place Michael in a regular math class. However, records show a relative decline in math scores and class performance related to Michael's distractibility even in a small group. I therefore find that integration into a regular math class would not be an appropriate action at this time.

Asked about alternative programs within the public schools, Mr. Foley suggested more integrated programs with resource room assistance. The descriptions were vague on the record leading to my conclusion that Burlington cannot provide an adequate and appropriate program. The record shows that the Carroll School does employ small group instruction, matching student's performance levels and needs to a greater extent than identified in Burlington. The emphasis of the total program is remediation of disabilities with focus on reading and related skills.

In reaching my conclusions I examined closely the testimony regarding the emotional or behavioral characteristics of students in Mr. McAleer's classroom. Evidence of behaviors that might distract Michael conflicts. While there is evidence that some students have pronounced emotional needs, there is no solid evidence that these needs, in and of themselves, would make the placement inappropriate. Parties agree that Michael could benefit from an emotionally supportive, success oriented environment. I note, as well, that objectives designed to help Michael deal with frustrations in the learning environment were to be implemented through an affective education component. Carroll School includes a similar class. This decision does not rest on discriminating between Michael's emotional needs and those of other students in Mr. McAleer's classroom.

My finding that the placement is not adequate is influenced by another factor. There is no testimony or evidence showing a need to shorten Michael's school day. I am concerned by Mr. McAleer's testimony that transportation schedules, rather

than Michael's needs dictated a program 15-20 minutes less than the regular school day.

REGULATORY REQUIREMENTS

1. I find the school system has exceeded the maximum 36 months chronological age span in Mr. McAleer's classroom in violation of section 502.4(c) of the 766 regulations. Section 204 requires a school committee to notify the Regional Office of the Division if there is a need to gain an exception to the regulations. I note that the Pine Glen School is organized for grades K-4, which would indicate a normal upper age limit of nine or ten, while Mr. McAleer has at least one student at age eleven. While the particular needs of students may indeed justify an exception, it is the responsibility of the school committee to seek such approval. I am most disturbed by Mr. Foley's response that he does not intend to request approval. I note Mr. Foley's statement that the Division's Compliance Review did not cite a non-compliance last year. This is irrelevant under the requirements of 204 and division policy directing annual reapplication.

2. I find the school committee in violation of regulations Ch. 766, § 317.0-317.5, 505.5; 45CFR 121a.500 these sections require parental notification and written consent to evaluations which are, or may be, used to determine classroom placement and program. The parents assert that they were not notified nor gave written consent prior to evaluations conducted by Ms. Meade and Ms. Mason in the Spring, 1979. The absence of records within the hearing supports their contention. Both specialists contended their assessments were part of retention considerations, rather than specified education issues. I am not persuaded by this argument, particularly since the IEP in June 1979 incorporates their findings.

Some comment is necessary regarding a seemingly artifical segregation of recommendations for retention from the Team evaluation process contained in Ms. Arin's testimony. Clearly the regulations of Chapter 766 intend for a school to consider referral for evaluation of children who are at risk of non-promotion (Ch. 766, § 315). While referral is not mandated, professional interdisciplinary advice should aide parents and school administrators in this sensitive and significant decision. Since the school committee in Burlington has placed the ultimate decision to retain a child with parents, they should be able to draw upon the recommendations of specialists — especially in a case when a child is already receiving special education services.

3. Both Chapter 766 and P.L. 94-142 contain extensive evaluation and procedural requirements which must be employed prior to and at the time an educational plan is written for a student. The record shows that in May 1977 Burlington notified the parents of their recommendation to retain Michael in grade one referencing an "educational plan." No evaluations pursuant to Ch. 766 had been done. Since later records do not include similar correspondence, I assume this practice has been discontinued. Parties concur that this practice does not conform to law and regulation.

4. Regulations require that an evaluation team issue an educational plan or a finding of no special needs at the conclusion of an evaluation. Parties agree this did not occur in June, 1977. I note however that the parents were sent copies of assessment reports, suggestions that a private reading tutor contact a teacher. The parents were also requested to contact the school about Michael's grade enrollment and subsequently did so.

5. I find the school committee did not conform to Chapter 766 sections 311 and 312 in June 1979, through failure to hold a meeting when all persons responsible for assessments met to discuss the results and draft an educational plan. I do note

extenuating circumstances in that assessment results were shared with the parents in several smaller meetings. The intent of the regulations is to assure educational decisions are based on a view of a *whole* child resultant from discussion questions, and ideas of a multidisciplinary team. This interaction is important to the consensus model envisioned by state and federal regulations and becomes critical when a decision to place a child in a restrictive, substantially separate program is possible. One can only speculate on whether the recommendations in the 1979-1980 would differ. It is clear that the parents had sufficient opportunity to discuss evaluations with individual specialists, however. My review of the educational plan shows incorporation of preceding teachers' reports and specialists' evaluations contrary to the parents position that the plan was dominated by Mr. Kavanaugh's findings. Ms. Arin's testimony confirms a plan was not physically written at a Team meeting; however Ms. Arin testified that general objectives were discussed.

6. Regulation § 320.1 also requires a full evaluation prior to a restrictive placement. I find technical violation of this regulation. Evidence show that new medical and home assessments were not conducted prior to June 4, 1979. However, Ms. Arin and the parents had agreed to further evaluations at Massachusetts General Hospital. Ms. Arin further testified they were waiting for these results prior to issuing a plan. The parents discussed with MGH staff the types of evaluation to be conducted. As a result, I can only conclude that the parents did not deem new home and physical assessments to be significant.

7. Section 322 of the 766 regulations required certain statements within an IEP. I find the school committee in substantial compliance with this section, although improvements in specificity could be made (a) in naming the reading methods

and materials (b) in placing timelines on objectives (c) in naming evaluating instruments. Further discussion between the school and parents could have easily resolved these difficulties.

8. I find the school committee in violation of section 337.2 pertaining to parents consent for modifications of the IEP for 1978-1979. Both Ms. Black and Ms. Mason testified that during April-June 1978, Ms. Black worked with Michael alone and that a second child was added for a portion of the period from September 1978 - June 1979. I cannot attach a direct causal relationship to the "reallocation of time" and Michael's slow progress based on the evidence. However the IEP specifies "Reading — Individual, 1 hour per day:" Objectives are marked for an individual instructional setting, as well. Applying the "reasonable man" standard, I would construe "individual" to mean that Ms. Black would work with Michael alone for that time. Further, there is ample evidence of Michael's difficulties in working independently and his need for direct supervision to complete tasks.

9. The parents have requested reimbursement for the cost of certain evaluations based on an allegation that the school committee failed to inform them fully of their rights in the evaluation process in 1977. The school committee contends (a) that it did not have adequate notice or opportunity to examine evidence or witnesses on this issue; (b) that the request for reimbursement is irrelevant to the present appeal year.

As to the issue of fairness, the hearing officer offered, on the date of hearing an opportunity to submit rebuttal evidence or arguments within written closing statements. Both parties subsequently requested that I extend deadlines for closing memorandum, which gave an additional three weeks for rebuttal. I concur with the school committee that the parents should have stated this specific issue earlier in the proceeding. Nevertheless, there is considerable support in the record to

find that the school committee was on notice as to procedural issues in current or prior years and that the issue of reimbursement might arise.

As to evidence on the record regarding the nature of claims, both Dr. Lott and Mr. Panico identified the dates of evaluations at MGH, the names of evaluators, the nature of testing. School committee records include copies of reports which correlate exactly to submitted bills, including the physical examination by Dr. Melvyn Levine (S-3, S-15, S-54, S-55).

Turning to the question of appropriateness to this appeal, ordinarily I might decline jurisdiction for issues of prior years based on the lack of timeliness of an appeal. In this matter, I will take jurisdiction. Note that references pertain to Chapter 766 regulations in effect through September, 1978 (yellow book).

A. I have concluded that the parents were not advised orally or in writing by the school committee of their rights in the evaluation process in 1977-1978. Ms. Arin, in response to a question by the hearing officer, prior to the last day of hearing, did not recall any verbal discussion of independent evaluations until May 1979, nor any written transmission of information about parents' rights subsequent to June 1977. The record shows Ms. Arin has responsibility for evaluation coordination in Burlington. The parents produced their original, and incomplete, notice of rights — a copy of which is in evidence (P-5). Based on the above, I must conclude that the parents cannot be held responsible for any delay in requesting appeal and that the matter is legitimately before the Bureau at this time.

B. The school committee is required to provide an examination by a physician as part of a "Full Core Evaluation" (311.0, 311.4). While parents commonly elect to provide such evaluation through private physicians at their own expense, it is the obligation of the school committee to inform parents of the option of evaluation at school expense. There is no evidence

on the record to conflict with the parents' claim that they were not so informed (P-5). Therefore, I find that the evaluation conducted by Dr. Melvyn Levine of Medford Pediatric Associates is the medical component of the core assessment in June, 1977 and is a legitimate expense of the school committee within the initial evaluation.

C. With reference to the neurological evaluation of Dr. Lott in December, 1977 the issue of school committee liability has two facets:

> (a) The school system did not, within its initial evaluation, conduct a neurological examination; thus the criteria of section 327.1 of equivalency is not met, and I do not construe the neurological assessments within the scope of Burlington's fiscal responsibility under that section;
>
> (b) Dr. Lott's testimony and his written reports clearly state that his evaluation of Michael resulted from referral by Dr. Levine, already noted as the medical member of the school team. Ms. Arin's notes (S-7 p.85) show that Mr. P. phoned in December, 1977, at the time of initial contact with Dr. Lott, to inform her of the evaluation, her notes further show Mr. P's expression of concern about headaches and Michael's continued "struggling" with school work. A review of November 16, 1977, teacher reports support the conclusion that Michael was having considerable difficulty with concentration on task and distractibility (S-78, p.197). Based on this, I conclude that the neurological evaluation relate to legitimate educational concerns; that the referral to Dr. Lott was made by a member of the school evaluation team; and that Mr. P.'s notification of Ms. Arin of Dr. Levine's referral is sufficient to fulfill requirements of section 312. I therefore find the school committee responsible for the December, 1977 neurological evaluation.

D. An evaluation including tests of intelligence, achievement, and some perception areas was conducted at the Cortical Function Test Laboratory on January 9, 1978 pursuant to referral from Dr. Lott. A review of the content of Burlington's June, 1977 evaluation shows equivalency to the school's original evaluation, thereby meeting this test of section 327. for independent evaluations and fiscal liability of the school committee.

E. On March 7, 1978, Dr. Lott met with Mr. and Mrs. P. to explain results of these evaluations subsequent to the receipt of written reports. I construe such a meeting to be an integral part of the evaluations and thereby find liability of the school committee here as well.

F. Records pertaining to the March, 1978 convening of the school evaluation team reveal no further evaluations in the period from June, 1977 were conducted by the school system prepatory to the March 1978-March 1979 educational plan; no request to waive assessments is contained in the record. Inspection of the plan itself (S-18) demonstrates strong reliance on the Massachusetts General Hospital Cortical Function Test Laboratory reports and Dr. Lott's recommendations.

In summary, I find the school committee liable for reimbursement of actual, out of pocket expenses incurred by Mr. and Mrs. P. which have not been paid by insurance or other third party payment up to the limits set by the Rate Setting Commission in effect at that time for a physical examination, neurological examination, and educational assessment.

ORDER

1. Burlington Public Schools shall pay for Michael's tuition and transportation to the Carroll School, a 766 approved private day school for 1979-1980.

2. Burlington Public Schools shall reimburse Mr. and Mrs. P. for costs related to the above placement dating from the rejection of the educational plan for 1979-1980, and
3. Burlington Public Schools shall reimburse Mr. and Mrs. P. for costs not paid by insurance for a medical evaluation conducted by Dr. Melvin Levine in June, 1977; neurological evaluations and consultations conducted or arranged by Dr. Ira Lott on December 16, 1977 and March 7, 1978 and for specific language evaluation Tests at Massachusetts General Hospital on January 9, 1978. Burlington may apply fee schedules of the Rate Setting Commission.

RECONSIDERATION OF DECISION:

Reconsideration of the case may be granted upon the showing of any serious error of law; misconstruction of Chapter 71B or the rules, regulations and policies of the Department of Education; or upon the discovery of material evidence existing at the time of the hearing, but not introduced, which, if proven, would be likely to alter the conclusion of the decision. Written application for reconsideration of such cases may be made by either party to the hearing officer who heard the case and in consultation with the Director of the Bureau of Special Education Appeals, such application may be granted or denied within the discretion of the Bureau. Application should be made within a reasonable time after the decision.

EFFECT OF DECISION AND RIGHTS OF APPEAL:

Both parties have rights of appeal under P.L. 94-142 (20 U.S.C. 1401), Chapter 71B and 30A of the Massachusetts General Laws. The parents may choose to appeal the decision

of the Bureau by so indicating on the form accompanying this decision, thereby constituting an appeal to the State Advisory Commission. The public school system, and the parents after the State Advisory Commission's final decision, may file a petition for review in the Superior Court or in the Federal District Court of competent jurisdiction within thirty (30) days after receipt of the final decision. The State Advisory Commission and the Court have review authority in that they will not hear new evidence in any form. They review the decision to determine if it is reasonable based on the facts and consistent with established policy and law. Where the parents of the child accept the decision of the Bureau of Special Education Appeals or the State Advisory Commission the decision is final and must be implemented immediately. Where the parents of the child reject the decision of the Bureau of Special Education Appeals or the State Advisory Commission the filing of a petition shall operate as a stay of enforcement of said decision. During the pendency of any judicial proceedings, unless the parents agree otherwise, the child shall remain in the educational placement implemented at the time the initial appeal was taken.

RECORD OF THE HEARING:

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party upon request and upon receipt of payment for the recording tapes. Massachusetts General Laws c. 30A sections 11(6) and 14(4) set forth the requirements for making available to a party or a court an official record of the proceedings.

> 30A § 11(6) Agencies shall make available an official record, which shall include testimony and exhibits, and

> which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.
>
> 30A § 14(4). Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceedings under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Thus, if either party requests of the Bureau of Special Education Appeals a certified written transcription of the entire sound recordings, or a portion thereof, that party must arrange for the transcription of the sound recordings at their own expense. Transcripts prepared by the party must be submitted to the Bureau of Special Education appeals for certification within 35 days of service of a copy of a petition for review upon the agency.

Any party unduly burdened by the cost of preparation of a written transcript of the sound recordings may petition the Bureau of Special Education Appeals for relief.

COMPLIANCE:

If either party believes that this decision is not being complied with, he/she should request in writing a compliance hearing. Said request should be as specific as possible and should be addressed to the Director of the Bureau of Special Education Appeals.

CONFIDENTIALITY:

In order to preserve the confidentiality of the child involved in these proceedings when an appeal is taken to Superior Court, or Federal District Court, the Bureau of Special Education Appeals strongly urges the appealing party to file the complaint without mentioning the true name of the parents or the child (i.e., use John or Jane Doe), and to move that all exhibits including the transcript of the hearing before the Bureau of Special Education Appeals be impounded by the court. If the appealing party (when it is the School Committee) does not seek to impound documents, the Department of Education through the Attorney General's Office shall move to impound the documents.

/s/_____
HEARING OFFICER January 31, 1980

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON and the
SCHOOL COMMITTEE FOR THE
TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS and
JOHN DOE, as he is father and next
friend of JOHN DOE, JR.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is an action by the Town of Burlington, Massachusetts ("the Town") against the Department of Education ("the Department") and against John Doe as he is the father of John Doe, Jr., (both pseudonyms) seeking review under Federal and State law of a decision of the Department under G.L. c. 71B § 3 and c. 30A as to the appropriate educational program of John Junior, a nine-year old boy with learning disabilities. The decision, which was reached after a lengthy hearing, ordered the Town to pay for John Junior's tuition and transportation at the Carroll School, a private day school in Lincoln, for the school year 1979-1980, and to reimburse Mr. and Mrs. Doe for costs related to the placement, including the costs of medical and neurological evaluations performed by private specialists in 1977 and 1978. Plaintiff sues under Federal law 20 U.S.C. § 1415(e)(2) and under the State statute Mass. G.L. c. 30A § 14.

The case is before me on cross motions for summary judgment on Count II of the Complaint, the State law count, Count II is properly in this Court under pendent jurisdiction, as it arises out of the same facts which form the basis for the Federal claim under 20 U.S.C. § 1415(e)(2). *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966).*

The scope of review under G.L. c. 30A § 14 is limited; this Court does not act as an independent fact-finder. Instead, it will remand, reverse or modify the decision of the Department only if the substantive rights of any party may have been prejudiced because the agency decision is, for example, in violation of constitutional provisions, in excess of statutory authority, based on an error of law or on unlawful procedure, unsupported by substantial evidence, or arbitrary or capricious. After a careful review of the law and of those portions of the record adverted to by the parties, I find that defendants are entitled to judgment on Count II as a matter of law.

---

* Defendants Doe assert that a municipal corporation lacks standing under Federal law, 20 U.S.C. § 1415 to bring an action in Federal Court, that therefore this Court has no subject matter jurisdiction over Count I and consequently can have no pendent jurisdiction over Count II. The argument is without merit. It ignores the explicit and unambiguous language of the statute, 20 U.S.C. § 1415(e)(2) which grants the right of appeal to a U.S. District Court to . . . "*any party* aggrieved by the findings and decision" of the State administrative agency (emphasis added), expressing a clear congressional intent to make the Federal forum available to either party. Defendants' reliance on *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (17 U.S.), and the cases following its doctrine, is also misplaced. The doctrine that a political subdivision of a state may not challenge the Constitutionality of a State statute or rule is not applicable where, as here, the challenge is not to the Constitutional validity where, as here, the challenge is not to the Constitutional validity of any law or rule but to the correctness of a hearing officer's application of the law to a particular set of facts. Moreover, the parties in this action clearly manifest sufficiently adversarial positions to assure the court that all issues will be fully presented, a concern of the doctrine which prevents subdivisions of the State from suing the State itself or its administrative agencies, on the ground that both are essentially the same entity and therefore not adversaries, *Rogers* v. *Brockette*, 588 F.2d 1057 (5th Cir. 1979).

Plaintiffs mount multiple attacks on the decision of the hearing examiner, but their arguments can be reduced to three basic charges: first, that there is no substantial evidence in the record to support the examiner's rejection of Mr. John McAleer's classroom as an appropriate educational environment for John, Jr.; second, that the decision of the hearing examiner is tainted and invalidated by her explicit reliance on the irrelevant issue of plaintiff's past violations of the Does' procedural rights, and, moreover, that plaintiffs were not given notice that this issue would be considered by the examiner; third, that the Carroll School is not the least restrictive placement which is adequate to meet John's needs. I consider each argument in turn.

The hearing officer's central finding was that the Town's assignment of John, Jr. to Mr. John McAleer's Special Needs classroom was inappropriate because of Mr. McAleer's limited experience in working specifically with learning disabled children, because he used a different reading method than the one John, Jr. had been tutored with for the previous year and a half, and because the class would not provide John, Jr. with a peer group of children with similar reading needs and with whom similar teaching methods would be employed. (BSEA #2867 p.8). The hearing officer agreed that "all evidence supports a view that Mr. McAleer is an excellent teacher." (BSEA #2867 p.8). Her finding that Mr. McAleer's classroom was nevertheless an inappropriate placement for John, Jr. reflects no criticism of Mr. McAleer's skill or achievement. Instead, the hearing officer correctly relied on testimony and reports which attested to the severity of John, Jr.'s perceptual difficulties, requiring placement with a teacher who specialized in similar disabilities, to his need for "a highly specialized setting for children with learning handicaps," (letter, Dr. Lott to Mr. Doe, 7/10/79 R-p.30), to professional recommendations that he continue with the Orton-Gillingham reading method

and that continuity of method is important. The hearing officer found that Mr. McAleer's experience, although it included excellent work with students manifesting a wide range of emotional and other disabilities, was not sufficiently specialized in the particular methods and skills which John, Jr. required. This finding does not mean, as plaintiffs assert in their brief (p.11) that it will now be virtually impossible for teachers who have not already taught dyslexic children to do so in the future. The finding is limited to the facts of this case, which support a conclusion that John, Jr.'s special problems, in conjunction with the method of reading instruction which had been used with him in the past by Ms. Black, necessitated a placement with an instructor trained in the Orton-Gillingham method and experienced in dealing with children similarly disabled.

Further, the hearing officer properly took into account the testimony of Dr. Lott and Ms. Black which indicated that John, Jr. would learn best in an environment which could provide a peer group of children with similar disabilities so that small group work could be the dominant mode of instruction, so that John, Jr. would not be frequently distracted, and so that he would not be the weakest student in the class.

While there was testimony by Mr. McAleer among others, indicating that John, Jr. could be successful in Mr. McAleer's class, there was also testimony that the composition of the class group, the reading and teaching methods used there and the lack of specialized training in John, Jr.'s particular disability rendered Mr. McAleer's classroom inadequate to meet John, Jr.'s special needs. The hearing officer was entitled to review the evidence on both sides and to reach her own decision. The fact that this court might have decided the facts differently does not invalidate the hearing officer's decision where, as here, it was supported by substantial evidence, *Labor Relations Commission* v. *University Hospital, Inc.*, 359 Mass. 516 (1971). The administrative agency, as fact finder, is the

sole judge of the weight and credibility to be accorded to the evidence before it. *Maddocks* v. *Contributory Retirement Appeal Board,* 369 Mass. 488, 495 (1976).

Plaintiff's second complaint is that the hearing officer's decision improperly rested on a finding of various procedural irregularities committed by the Town in dealing with the Does. While plaintiffs are correct that it was improper for the hearing officer to rely on past behavior which was irrelevant to the Town's capability of implementing the Individual Educational Plan ("IEP") in the future, *Cohen* v. *Bd. of Registration of Pharmacy,* 350 Mass. 246 (1966), I find that the decision nevertheless rests on grounds which are independently adequate. The hearing officer indicated that her decision rested both on "doubts that Mr. McAleer's classroom is an appropriate placement" and on the finding that the Town lacked the "capacity to comply with educational and procedural mandates" on John, Jr.'s behalf. (BSEA #2867 p.7). As discussed above, the hearing officer's findings as to the educational appropriateness of Mr. McAleer's classroom are supported by substantial evidence. In addition, several of the "procedural" irregularities, such as the impermissibly broad range of students in Mr. McAleer's class, (BSEA #2867 p.9) might well affect the educational environment and thus the appropriateness of the placement. It was open to the hearing officer to determine that expert recommendations that John, Jr. needed to be among small groups of peers with similar disabilities precluded a placement in a class of seven children whose ages covered a four-year span. Accordingly, although the hearing officer's decision is inartful and contains irrelevant matters, these matters are not central to her decision so as to taint and invalidate it. Her lengthy catalogue (BSEA #2867 pp.9-11) of instances of failure to comply with State law and regulations in dealing with the Does is not necessary to support her finding. This being so, the further issue of lack of notice to the plaintiffs

that procedural irregularities would be considered becomes moot.

Third, the hearing officer's finding that the Carroll School is the least restrictive adequate alternative must be upheld on the record. Once the placement in Mr. McAleer's classroom had been found to be inadequate to meet John, Jr.'s needs for an intensive specialized small group setting, and further, because no other potential placements were specifically proposed or discussed, the Carroll School was in fact the least restrictive available placement which was adequate to meet all of John, Jr.'s particular academic needs. While it is true that a specialized private school appears to be a restricted environment in comparison to a public school which offers at least the possibility of mainstreaming certain academic subjects, it must be remembered that the overriding concern of the hearing officer is to determine which placements will meet all of the child's special needs and then to choose the least restrictive among otherwise adequate alternatives. In this case the Carroll School was the only appropriate choice.

Finally, the hearing officer's order that the Town pay the costs of medical and neurological assessments performed in 1977 by Dr. Melvyn Levine and Dr. Ira Lott (BSEA #2867 p.12) must also be upheld. The hearing officer heard uncontradicted testimony that the Does had not received notice from the Town of their right to have such assessments performed at school expense. The Town's contention that it received no notice that this issue would be considered is without merit. The hearing officer had discretion to consider all issues relating to John, Jr.'s evaluations and placement, the Town brought its records and participated in lengthy hearings, and briefed this issue after the hearing.

Accordingly, defendants' motion for summary judgment on Count II is allowed; plaintiff's motion for summary judgment on Count II is denied. There being no just reason for delay, judgment for defendant shall be entered pursuant to F.R.C.P. 54(b).

November 19, 1980
Date

/s/ _____
Rya W. Zobel
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON and the
SCHOOL COMMITTEE FOR THE
TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS and
JOHN DOE, as he is father and next
friend of JOHN DOE, JR.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision, it is

ORDERED that judgment be and it is hereby entered for the defendants on Count II.

November 19, 1980
Date

/s/_____
Rya W. Zobel
District Judge

TOWN OF BURLINGTON and the School Committee of the Town of Burlington, Plaintiffs, Appellants,

v.

The DEPARTMENT OF EDUCATION OF the COMMONWEALTH OF MASSACHUSETTS and John Doe, as He is the Father and Next Friend of John Doe, Jr., Defendants, Appellees.

Nos. 80-1527, 81-1112.

United States Court of Appeals,
First Circuit.

June 18, 1981.

David Berman and John F. Zamparelli, Medford, Mass., Town Counsel for plaintiffs, appellants.

Michael Broad, Asst. Atty. Gen., Boston, Mass., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass., was on brief for appellee, Dept. of Ed. of the Commonwealth of Massachusetts.

Gerald B. Gallagher, Acton, Mass., for defendants, appellees John Doe, etc.

Before COFFIN, Chief Judge, BOWNES, Circuit Judge, WYZANSKI, Senior District Judge.*

COFFIN, Chief Judge.

The ultimate question to be decided in this case is whether the Town of Burlington, Massachusetts must pay for the special education of John Doe, Jr. The district court held that the

* Of the District of Massachusetts, sitting by designation.

Massachusetts Department of Education's decision that the Town must reimburse Doe, Jr.'s father was supported by substantial evidence as a matter of state law. It also denied the Town's motion for stay of the Department's decision and granted Mr. Doe's and the Department's motions that the Department's decision be enforced during the pendency of the action. The Town appeals all three judgments. We vacate the first and third judgments and affirm the second judgment.

I

The parties to this suit agree that John Doe, Jr. has special educational needs justifying some type of publicly financed service. *See generally* 20 U.S.C. §§ 1401-20 (providing federal aid for education of handicapped); Mass.Gen.Laws Ann. ch. 71B (West Supp.1981) (providing for education of children with special needs). The Town proposed that he attend the special education program at the Pine Glen School, a public school that provides both regular elementary and special educational curricula. Mr. Doe preferred the private Carroll School. As state law provides, Mr. Doe sought review of the Town's decision by the state Department of Education. *See id.* at §§ 3 & 10; 603 C.M.R. § 401.0 (Code of Massachusetts Regulations). *See also* 20 U.S.C. § 1415(b)(2) & (c). The Department held hearings on this matter from September to November 1979. At the beginning of his child's fourth grade year in September 1979, Mr. Doe enrolled his son in the Carroll School. In January 1980, the Department ruled that the Carroll School was the appropriate program and ordered the Town to pay for the child's education there. In its decision the Department advised that the Town could "file a petition for review in the Superior Court or the Federal District Court." *Cf. Ezratty v. Commonwealth of Puerto Rico,* 648 F.2d 770, at 776 (1981) (no express consent by Puerto Rico to suit in federal court).

The Town then sought judicial review of the Department's decision. It filed suit against the Department and Mr. Doe in

federal district court on a two count complaint. Jurisdiction for the first court ["the federal count"] was founded upon 20 U.S.C. § 1415(e)(2), which provides for judicial review for "[a]ny party aggrieved by the findings and decision made" pursuant to state procedures required of state and local agencies receiving federal assistance by the federal aid-to-the-handicapped scheme.[1] *See id.* at § 1415(a), (c) & (e). The second count ["the state count"] claimed to be a pendent matter under

---

[1] "§ 1415. Procedural safeguards

(a) Any State education agency [and] any local educational agency . . . *which receives assistance under this part* . . . shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that *handicapped children and their parents or guardians* are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to — . . .

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by . . . the local education agency. . . .

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency . . ., any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review. . . .

(e)(1) . . . A decision made under subsection (c) *shall be final, except* that any party may bring an action under paragraph (2) of this subsection.

(2) . . . [A]ny party aggrieved by the findings and decision under subsection (c) . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In *any* action brought under this paragraph the court shall receive the records of the administrative proceedings, *shall hear additional evidence*

a Massachusetts law establishing judicial review for "any person . . . aggrieved by a final decision of any agency. . . ." Mass.Gen.Laws Ann. ch. 30A, § 14 (West 1979).[2]

The Town moved on May 26, 1980 for a stay of the Department's order that the Town pay for the Carroll School education. It sought only to avoid payment to the Carroll School and to Mr. Doe at that time; it did not seek and has not sought to have John Doe, Jr. transferred from his ongoing education at the Carroll School. In connection with this motion, the Town requested an evidentiary hearing. After hearing oral argument on July 7, 1980, but without taking evidence, the district court denied the requested stay on July 24, 1980. The Town appealed to us from that decision.

---

at the request of a party, and, basing its decision on the *preponderance of the evidence,* shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ." (Emphasis added.)

Since § 1415(a) applies only to state and local educational units that "receive[ ] assistance under this subchapter", we understand the receipt of such assistance to be a jurisdictional prerequisite to review under § 1415(e)(2), and, therefore, a matter to be pleaded in the complaint. *See* Fed.R.Civ.Proc. 8(a). The Town's original complaint satisfied this requirement only indirectly — by appending and incorporating the Department's decision, which indicates that the federal statute, P.L. 94-142, and its accompanying regulations apply in this case. *See* 45 C.F.R. § 121a.2 (1979) ("Applicability [of regulations] to State, local, and private agencies"). The fact of federal funding is confirmed by the subsequently filed papers in No. 81-1112. They show that the Town has amended its complaint to add a count reciting that a Department official "held a hearing on whether to freeze federal funds for aid to the handicapped to Plaintiff under Title 20 U.S.C. § 1414(b)(2)(A)."

A more direct statement of jurisdiction from the outset would have been preferable.

[2] This count also asserted jurisdiction based on "the provisions of Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 1343 and Title 20 U.S.C. § 1331. . . ."

The parties filed cross motions for summary judgment on the state count, which the district court decided in favor of the defendants on November 19, 1980. The district court certified this judgment as final under Fed.R.Civ.Proc. 54(b), and set the federal count for future trial. The Town appealed from the summary judgment decision. We consolidated this appeal with that already pending from the district court's July 24 decision to constitute No. 80-1527.

We heard oral argument in No. 80-1527 on March 4, 1981. Meanwhile, the posture of the case had continued to change. The Department moved for a preliminary injunction on December 11, 1980 to enforce its order requiring the Town to pay tuition and to reimburse the Does. This motion supplemented Mr. Doe's pending motions to similar effect. On December 15, 1980, the Massachusetts Commissioner of Education wrote to the Town threatening to freeze *all* of its special education assistance unless the Town complied with the Department's order. After a hearing on this matter, a state hearing officer concluded on January 30, 1981 that the Department properly could withhold fiscal year 1981 funds from the Town. On February 9, 1981, the district court held a hearing at which the Town stated that it was now "prepared to keep this child in school until this case can be decided." The Town also made clear that it would also pay for the child's school transportation "from here on in . . . without any problem to Mr. Doe." We were informed at oral argument that the Town has made good on these commitments.

The Town persisted, however, in refusing to reimburse Mr. Doe for his *past* expenses for the 1979-1980 academic year. On February 12, 1981, the district court issued an order requiring the Town, *inter alia,* to reimburse Mr. Doe in the amount of $8837.97 for past educational expenses. The Town appealed

this order, which we docketed as No. 81-1112 and in which we heard oral argument on June 3, 1981.[3]

We therefore have before us in No. 80-1527(1) an appeal from the district court's November 19, 1980 grant of summary judgment for the Department and Mr. Doe on Count II of the Town's complaint, and (2) an appeal from the district court's July 24, 1980 denial of the Town's motion for stay of the Department's order pending final resolution of the case. In No. 81-1112 we are presented with the Town's appeal from the district court's February 12, 1981 order of 1979-1980 reimbursement. We consider these issues in that order.

II

[1] We hold that the district court erred in granting summary judgment for the defendants under state law because we conclude that state law cannot be applied when review under federal law is sought. By its terms 20 U.S.C. § 1415(e)(1) provide that decisions by the state educational agency "shall be final, except that any party" has judicial appeal rights under 20 U.S.C. § 1415(e)(2). That subsection provides for review *in state or federal court*. It also sets forth the procedure and standards for this review: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.*

This federal specification for review, when invoked, seems to us designed to occupy the field over an inconsistent state pro-

---

[3] The Town moved that this order be stayed pending our decision. Since we rule on the merits of this issue in part IV of this opinion, the question of stay is now moot.

vision.[4] Here the arguably applicable state review provision — part of the state's general administrative procedure legislation — calls for, *inter alia*, judicial review governed by the substantial evidence standard. Mass.Gen.Laws Ann. ch. 30A, § 14. This standard does conflict with the federal standard; we can imagine many judicial reviews that would uphold an agency decision as based on substantial evidence but that would reach a different result were new evidence to be taken and judged under the more rigorous "preponderance of the evidence" standard.

This conflict could lead to results that should be avoided. For instance, the Department might have ruled in this suit that the Town's proposed plan was faulty but that appropriate relief was something other than what Mr. Doe sought. One aggrieved party might have selected a state forum for review under state law while the other filed in federal court claiming review under the federal standard. If both review provisions legitimately coexisted, the resolution of the controversy could inspire an unseemly race to judgment. Even this would not dependably produce consistency. A decision based simply on substantial evidence would not be res judicata for an issue to be decided by the more probing preponderance of the evidence standard. The converse situation would often be more settled, since a finding under the preponderance standard would generally control the substantial evidence question. But inconsistencies could appear here as well. The federal provision directs that the reviewing court "shall hear additional evidence at the re-

---

[4] We need not decide whether the federal review provision would have preemptive force when the only aggrieved party seeks relief *solely* under state law since here the Town *has* invoked 20 U.S.C. § 1415. It is possible that an aggrieved party might for financial or other reasons be satisfied with the more limited judicial review available under state law; conceivably the federal policy embodied in § 1415 would not be infringed when willingly waived by its beneficiary.

quest of a party", while the state provision normally confines its review to the record developed by the agency. *See* Mass.Gen.Laws Ann. ch. 30A, § 14(6) (West 1979). A preponderance-of-the-evidence holding based on an expanded record could present a different legal issue than that faced on a substantial evidence review of a limited record, thus again presenting the specter of inconsistent federal and state judgments, one which might attempt to affirm and enforce the Department's ruling while the other sought to overturn it.

We therefore vacate the district court's decision concerning state law that does not apply in this case.[5] This will leave the scheduled trial on the federal count as the sole mechanism of judicial review in this case.

III

[2] The Town appropriately styled its motion that the district court stay the Department's enforcement of its order as a request for a preliminary injunction. Therefore, the Town "faces a heavy burden in attempting to convince us to upset the judgment of the district court in this matter." *Manning v. Trustees of Tufts College*, 613 F.2d 1200, 1202 (1st Cir. 1980). We resolve the question on the narrow ground that the Town has not shown a danger of immediate irreparable injury. *See Automatic Radio Mfg. Co. v. Ford Motor Co.*, 390 F.2d 113, 116 (1st Cir. 1968).

---

[5] Mr. Doe urges that the Town should not be allowed to invoke 20 U.S.C. § 1415(e)(2) as "an[ ] aggrieved party" since an earlier section, *id.* at § 1415(a), refers only to "handicapped children and their parents and guardians. . . ." The district court rejected this narrow construction of § 1415(e)(2)'s "any party aggrieved" language as ignoring "the explicit and unambiguous language of the statute. . . ." We affirm this reasoning. We also note that to confine a town to review under state law could lead to one-sided results if the town's opponents could race to a federal review that is preemptive or otherwise normally controlling as res judicata by virtue of its more scrutinizing character.

The Town's only asserted injury is the payment of money it fears will not be returned should it prevail in this suit. This sum is the Town's share of the added cost of the private Carroll School over the public Pine Glen School,[6] which the Town claimed was at least $3691 a year.[7] Apparently assuming that the litigation would last two years, the Town thus argued that it faced an irreparable injury of $7400.

Normally the fact of a relatively small and precisely quantifiable injury is sound evidence that preliminary equitable relief is not warranted since just such injuries can be remedied adequately by final judgment. In this case the Town attempted to escape this general guide by pointing to Mr. Doe's statement, appended to his "Motion to Require Plaintiffs to Honor Decision of the Department of Education of the Commonwealth", that he would "not have the full liquidity needed to litigate this case against a governmental body with comparatively unlimited financial assets."[8] The Town commented that it was "hardly necessary to read between the lines; if the town pays out the money to pay for John's education at the Carroll School,

---

[6] The Town asserts that the net marginal cost of withdrawing John Doe, Jr. from the regular public program and enrolling him in the special public program at Pine Glen is negligible.

[7] According to the Town, the Carroll School costs a total of $6486 a year, of which the state will reimburse to a maximum of $2795. The Town stated that this maximum reimbursement is "rarely if ever reached" but did not disclose the extent of the typical shortfall. Since the burden of establishing irreparable injury rests with the party seeking the injunction, from this lack of allegation we presume that the shortfall typically is not significant.

[8] Mr. Doe also stated that he "took the financial risk" of transferring Doe, Jr. to the Carroll School. We think this mention of risk refers to the fact Mr. Doe's ultimate success in, and hence right to reimbursement from, the Department's appeal process was uncertain. *See Amherst-Pelham Regional School Comm. v. Dep't of Educ.*, 376 Mass. 480, 493, 381 N.E.2d 922, 931 (1978) (parents "assumed a financial risk that the bureau would recommend a different [educational] placement" for their child).

its chances of ever seeing that money back if it prevails on either or both counts of the present action are slim."

We do not think that Mr. Doe's statement — the sole contemporaneous substantiation that the Town offered for a threat of immediate irreparable injury — was sufficient to discharge the Town's burden in requesting an injunction here. We take Mr. Doe's lament regarding "liquidity" in its ordinary sense, as referring to a condition in which assets are not liquid, but are not necessarily wanting. The reference to litigation "against a governmental body with comparatively unlimited financial assets" we understand to imply either that the Does expected that their ability to match the Town's conduct of this litigation would be hindered by their own more pressing resource constraints, or that they would be forced to make undue sacrifices (such as liquidating major capital assets, like their home) to keep pace with the Town. Neither of these possibilities would necessarily hamper the Town's ability, in the event of its ultimate victory, to collect a $7400 judgment against an individual that the record shows to be employed by the federal government as a professional in a supervisory position. A cynical observer might remark that these impediments to the Does' capacity to finance spirited litigation could even *increase* the chances of the Town's final recovery. We therefore cannot say that the district court abused its discretion in denying the Town's request for preliminary injunction.

[3] The Town also complains that the district court ruled without holding an evidentiary hearing. We observe that the Town exercised its ample opportunity to brief its position, and again presented its arguments in a substantial oral hearing before the district court. The sole asserted basis for the threat of irreparable injury in each instance was Mr. Doe's statement. Although the Town made clear its desire to provide evidence on its probability of success on the merits, at no time did it submit affidavits or make offers of proof on the matter of ir-

reparable injury. Under these circumstances the district court could fairly conclude that further hearings to take evidence were unnecessary to decide the motion before it.

IV

[4] We now come to the February 12, 1981 order that the Town reimburse the Does for their 1979-1980 expenses according to the Department's decision "pending a final determination on the merits". The district court explained that this payment was required since 20 U.S.C. § 1415(e)(3) ("the child shall remain in the then current educational placement of such child" during review proceedings) had "been held in this case to require that John, Jr. be maintained at the Carroll School during the pendency of this litigation. Judgment and Memorandum of Decision November 19, 1980."[9]

We think the district court misinterpreted the intent of 20 U.S.C. § 1415(e)(3). As we read this section, it provides only that children shall remain "in the then current educational *placement*" (emphasis added) during placement disputes. Here no one proposed to change Doe Jr.'s placement at the Carroll School; rather the dispute was over who should bear a portion of the expenses of that placement until final judgment could be rendered. We therefore think that the district court should have handled the petition for reimbursement of the Does as a petition for preliminary injunction and applied the traditional criteria. Had it done so, we believe that neither the Department nor Mr. Doe could be found to have made a showing of irreparable harm after the Town undertook on February 9 to pay all but the Does' first year expenses. Mr. Doe had displayed

---

[9] Because the district court made no reference to the Does' pending motion that the Town be placed in contempt, we assume that the court intended to take no action on this motion in its February 12 order.

his ability to pay these sums. The record before us contains no demonstration of impending injury that final judgment, should it be in his favor, would be unable to redress.

If by its reference to its decision of November 19, 1980 the district court meant to make a finding that the Does and the Department had a likelihood of success on the merits, we think that this also was error. We have vacated this November 19 judgment in part II of this opinion. Moreover, that judgment purported only to consider state law and thus had not determined what the different federal provisions might dictate in this case. Any finding on the likelihood of success would have required a hearing on the evidence that the parties proposed to introduce in the § 1415(e)(2) review.

Our result in this case might be thought anomalous because we have affirmed a refusal to stay the Department's order but have reversed an order to enforce it. Any anomaly is superficial. The refusal to apply interim judicial powers of equity on either side leaves the field open to extrajudicial resolution. Here that resolution has produced an apparently fair division of the burdens of delay, in that neither side to date has shown the threat of irreparable injury that provides the rationale for interim relief. *See* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv.L.Rev. 525, 540-48 (1978). If on remand further questions as to preliminary relief arise, we are confident that the district court will expedite trial on the federal count so that the underlying merits of this suit may be clarified. *See* Fed.R.Civ.Proc. 65(a)(2). *See also id.* 65(c) (requiring appropriate security be posted should preliminary injunction issue).

The district court's grant of summary judgment is vacated, as is its order of February 12, 1981. Its denial of preliminary injunction is affirmed. The case is remanded with instructions that the second count of the Town's complaint be dismissed and that trial proceed on the first count. No costs.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-359-Z

TOWN OF BURLINGTON, ET AL.,

VS.

DEPARTMENT OF EDUCATION, ET AL.

PRETRIAL ORDER

ZOBEL, D.J.

Pleadings and Parties

This is an action under The Education for all Handicapped Children Act of 1975 ("the Act"), 20 U.S.C. § 1401-20, to review the decision of the Department of Education of the Commonwealth of Massachusetts ("the Department").

Plaintiffs, the Town of Burlington and the School Committee of the Town of Burlington ("the Town"), seek review of the determination of the state Bureau of Special Education Appeals ("BSEA") that the appropriate placement of John Doe, Jr. for the school years 1979-80 was at the Carroll School, Lexington, Massachusetts. Named as defendants are John Doe, Sr., as father and next friend of John Doe, Jr., and the Department. Defendant Doe has filed a counterclaim for damages against the Town, several school administrators and members of the school committee. All defendants in counterclaim have moved to dismiss. The Town has also moved for summary judgment with respect to the complaint on the ground that Doe is barred from tuition reimbursement for having changed his son's place-

ment while proceedings were pending. Failing that, the Town seeks summary judgment on the grounds that a) this court's jurisdiction is limited to the 1979-80 school year and b) that defendant Doe's failure to make his son available for evaluation subsequent to the 1979-80 school year bars recovery.

Certain other procedural issues were raised at a pretrial conference held on November 2, 1981.

Order

1. The motions to dismiss the Doe's counterclaim are allowed.

2. The Town's motion for summary judgment is denied.

3. The Court has jurisdiction to grant relief for years after 1979-80.

4. The Court will admit the transcript of the administrative hearing and any additional relevant evidence offered by any party.

Since the Court has jurisdiction to grant relief for years after 1979-80, evidence as to such later years is relevant. However, neither hypothetical evidence as to the progress John Doe would have made in the public school, nor evidence of the parents' conduct is admissible.

5. The issues to be tried and determined are:

a) What was the "appropriate" placement for John Doe during the school year 1979-80.

A resolution of this issue will depend on evidence concerning i) the nature of John Doe's learning disability and special education needs, and ii) the Town's proposed individual educational plan.

b) What is the "appropriate" relief to be granted for subsequent years.

A resolution of this issue will depend on evidence concerning i) John Doe's educational needs during 1980-81 and 1981-82, and ii) available facilities and programs to satisfy his needs.

c) Should the Town pay costs related to John's placement in 1979-80, including medical evaluations performed by specialists in 1977 and 1978. There being no factual disputes with respect to this issue, the parties will stipulate to the amount and the court will determine on the basis of the law where the obligation properly lies.

6. The Town has the burden of proving by a preponderance of the evidence that the plan it formulated for John Doe, Jr. for the year 1979-80 was appropriate for him (Issue (a)).

The defendants Doe have the burden of proving the appropriateness of the relief they seek for years after 1979-80 (Issue (b)).

7. The case will be tried to the Court without a jury. Because I will hear additional evidence requested by the parties, counsel are requested to submit further pretrial memoranda listing their witnesses and exhibits, and estimating the trial time.

Discussion

Motion to Dismiss Counterclaim for Damages

Insofar as the counterclaim is based on Title 20, U.S.C. and on claims under 42 U.S.C. § 1983, it is dismissed under the authority of *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981). The "bad faith" exception envisioned by *Anderson* v. *Thompson, supra,* refers to a fact situation different than the one presented by the instant case. In *Anderson*, the court noted that, where a school district acts egregiously by failing to comply with procedural requirements, parents who were

forced to arrange unilaterally for appropriate services may be entitled to money damages for the cost of those services should they ultimately prevail. *Id.* at 1214. Notwithstanding the "bad faith" requirement, on which I do not rule, in the counterclaim Doe, Sr. is not seeking reimbursement for expenses incurred. Therefore, he is not entitled to rely on the bad faith exception articulated in *Anderson, supra*. The pendent state claims are dismissed under the authority of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Town's Motion for Summary Judgment

In its motion for summary judgment, plaintiff has asserted that because Doe, Sr. placed his child in the private Carroll School in September 1979, rather than retain him in the Pine Glen School recommended by the Town, 20 U.S.C. § 1415(e)(3) bars him from reimbursement. Section 1415(e)(3) provides:

> (3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . .

The section is intended to ensure the maintenance of the status quo during the course of litigation over the substantive issue of placement. *Monahan* v. *State of Nebraska*, 491 F.Supp. 1074, 1088 (D.Nebr. 1980).

The First Circuit has already implicitly rejected the Town's argument. In this case, *Town of Burlington* v. *Dep't. of Education*, 655 F.2d 428 (1st Cir. 1981) the court distinguished a dispute over tuition reimbursement, as here, from one over a change in physical placement. *Id.* at 433. It interpreted § 1415(e)(3) as applying only to the situation where the actual physical placement of a child was at issue. *Id.* In this case there is

no debate over the child's physical placement. The child has been at the Carroll School since September 1979, and no effort has been made to remove him from that setting. Because the debate centers not on a physical placement, but on the allocation of tuition costs with respect to a settled placement, this Circuit has held that § 1415(e)(3) is not applicable in this case.

The Town nevertheless argues that the decision of the Fourth Circuit in *Stemple* v. *Board of Education of Prince George's County*, 623 F.2d 893 (4th Cir. 1980) *cert. denied*, 101 S.Ct. 1348 (1981) bars a parent who has altered his child's placement during the pendency of the proceedings from litigating the substantive placement issue. In *Stemple*, the court found that the parents' unilateral decision to place their child in private school during the proceedings negated their right to recover the tuition costs they had incurred. It stated that § 1415(e)(3)

> creates a duty on the part of parents who avail themselves of the hearing and review provisions of (§ 1415) to keep their child in his current educational assignment while the hearing and review provisions are pending. . . ., that duty . . . certainly negates any right on the part of parents . . . to elect unilaterally to place their child in private school and recover the tuition costs thus incurred. *Stemple* at 897.

If *Stemple* is read to bar an appeal of the substantive issue of appropriate placement by parents who unilaterally changed their child's placement during the course of the proceedings it contravenes the Act. Section 1414 guarantees a handicapped child a "free and appropriate education" in states which accept federal funding. *Stemple* can only be properly interpreted to mean that a parent who unilaterally moves a child into a private school setting is at risk for tuition costs for that period, should

he ultimately lose the substantive "appropriate" placement issue. Therefore, even were one to ignore the First Circuit's interpretation of § 1415(e)(3) in the context of this case, Doe Sr.'s action in removing his child from the public school in September 1979 does not affect his right to avail himself of the appeal procedure provided by the Act.

Procedural Issues

20 U.S.C. § 1415(e)(2) provides the procedural framework for this case. That section establishes that

> [a]ny party aggrieved by the findings (of the state education agency) shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversey. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The statute has been interpreted to require that a court's review of the agency hearing shall be by a trial *de novo*. *Monahan, supra*, at 1084; *New York State Ass'n* v. *Carey*, 466 F.Supp. 479, 486 (E.D.N.Y. 1978); *Lora* v. *Board of Education of the City of New York*, 456 F.Supp. 1211, 1227 (E.D.N.Y. 1978). *See also* Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harvard L. Rev. 1103, 1108 n. 35 (1979). However, questions remain as to the weight to be afforded to the agency findings, the allocation of the burden

of proof, admission of evidence in addition to the administrative record, and jurisdiction of the court with respect to subsequent school years as to which state administrative remedies may not have been exhausted.

Resolution of these questions is complicated by an inherent conflict. On the one hand, it is incumbent upon a court to defer to administrative expertise in matters with which the courts have little familiarity. *Ezratty* v. *Commonwealth of Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981). On the other hand, Congress has clearly articulated a desire to invest the federal courts with a greater role in the enforcement of appropriate education for the handicapped. *Campbell* v. *Talladega County Board of Education*, 518 F.Supp. 47, 53 n. 9 (N.D.Ala., E.D. 1981).

The statute appears to set up a hybrid form of review. While the Court must make an independent determination, the statute specifically authorizes the court to "receive the records of the administrative proceedings". In light of this mandate, it is appropriate to give the agency decision the *prima facie* effect given to Master's findings. *See generally,* Enforcing the Right to An Appropriate Education, *supra*, at 1108 n.36 (opinions of state hearing officers an important element, yet deference will depend on nature of case); M.S. Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate, 1976 U.Ill. L.F. 1016, 1069. Because the statute also requires the court to "hear additional evidence at the request of a party", I am bound to receive additional evidence offered by the parties, provided it is relevant.

In determining the relevance of certain testimony the court is bound by the language of the statute which empowers it to "grant such relief as (it) determines is appropriate". This language has been given a broad interpretation in a recent opinion, *Rowley* v. *Board of Education of Hendrick Hudson Central School District*, 483 F.Supp. 536 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2nd Cir. 1980), *cert. granted on other grounds*, 50

U.S.L.W. 3334 (U.S. November 2, 1981) (No. 80-1002). In that case the court rejected a motion to dismiss the complaint for lack of jurisdiction on the grounds that plaintiffs had failed to exhaust their administrative remedies for years subsequent to the school year which was being litigated. The court held that since its power to grant any "appropriate" relief included injunctive relief extending beyond the school year at issue, it would hear evidence dealing with subsequent years in addition to the specific school year before it. *See also, Anderson* v. *Thompson*, 495 F.Supp. 1256, 1260-61 (E.D.Wis. 1980) ("little purpose served by freezing the evidence at the moment in time when the final state administrative decision was rendered"); *Norris* v. *Dept. of Ed.*, 80-1527(S)(M) (D.Mass. Oct. 9, 1981).

Although the statute requires that plaintiffs exhaust all administrative remedies before appealing their claims to the District Court, I am persuaded by the well-reasoned opinion in *Rowley*. Because the statute requires the development of an annual Individualized Education Plan (IEP) for each child, the requirement that administrative remedies be exhausted for each school year creates a situation in which a dispute is in danger of continuing indefinitely. Since Congress has vested in the District Courts the responsibility of determining the appropriateness of a handicapped child's education and since they must do so after a trial *de novo*, in the interest of judicial economy and efficiency, I adopt the position taken in *Rowley* and will hear evidence respecting the years subsequent to 1979-80.

However, I do not consider the hypothetical evidence as to the progress John Doe would have made had he been in the Pine Glen School to be relevant either to the school years 1979-80 or to subsequent years. Since such evidence is too speculative to be probative, I will not receive such evidence. Nor do I consider the conduct of the parties with regard to subsequent evaluations to be relevant to the "appropriateness" of an educational placement for John Doe during those years,

and I will receive no evidence on that issue. *See Anderson* v. *Thompson, supra*, at 1264. (Court's function is not to allocate blame among parties for their past inabilities to agree on an education program).

Neither the parties nor my research has found any case law which specifically addresses the issue of burden of proof in this context. Section 1415 provides that the court, after hearing evidence, "bas(e) its decision on the preponderance of the evidence." The question remains whether a court, conducting what has been described as a form of trial *de novo*, properly places the burden of proof on the party attacking the agency decision or the one attempting to uphold it.

Typically, in a review of an agency determination, the court requires that the party attacking the decision demonstrate that the agency's determination was not based on substantial evidence. Under § 1415, however, the burden is only to demonstrate that the Bureau's findings are not supported by a preponderance of the evidence. Therefore, placing the burden on the party seeking to overturn the agency's decision, yet making the burden less onerous than in the typical agency review situation, is consistent with the intent of the Act to make review easily accessible. Accordingly, the Town bears the burden of showing that the placement it devised for the year 1979-80 was appropriate for John Doe. In this case, however, the Doe defendants request relief not only for the year 1979-80, but for all later years to date. Since the Town has not prepared any educational plans for those later years, it cannot prove that they were appropriate for John Doe, Jr. Accordingly, with respect to those subsequent years the burden is properly on the Doe defendants to prove by a preponderance of the evidence the appropriateness of the relief they seek.

March 18, 1982
Date

/s/_____
Rya W. Zobel
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF BURLINGTON and the SCHOOL COMMITTEE FOR THE TOWN OF BURLINGTON

vs.

THE DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS and JOHN DOE, ppa, JOHN DOE, JR.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is an action under The Education for All Handicapped Children Act of 1975 ("the Act"), 20 U.S.C. §§ 1401-20. The Town of Burlington and the School Committee of the Town of Burlington ("the Town") seek review of the determination of the Bureau of Special Education Appeals of the Massachusetts Department of Education ("BSEA") that the appropriate placement of Michael Panico* for the 1979-80 school year was at the Carroll School, Lexington, Massachusetts, a private school. Following a pretrial conference, I defined the triable issues to include not only the "appropriate" placement for Michael during the 1979-80 school year, but also the "appropriate" relief for subsequent years. The parties agreed that a subsidiary issue, whether the Town is liable for costs for medical evaluations, was a legal issue, and that they would stipulate as to the amount involved.

---

* Although the names of the child and his father had been sealed, and these defendants styled as John Doe, Jr. and Sr., the parties agreed at trial to the use of their actual names.

The evidence at the trial included, in addition to the entire administrative record, the testimony of administrators and teachers of the Burlington school system, administrators and teachers of the Carroll School, Robert A. Panico, the father of the child, and two medical experts, Dr. Marcel Kinsbourne, called by the Town, and Dr. Melvin David Levine, called by Mr. Panico.

FINDINGS OF FACT

A. *Background and History.*

Michael Panico was born on September 7, 1970, the second of three children in the family. When he was in the first grade, his teacher, Beverly Reber, noticed that he had difficulty in attending to his business, that he progressed more slowly than other first graders in learning to read and that he appeared to be immature in comparison with his classmates. Ms. Reber conferred with the Panicos several times during the year and finally recommended that Michael repeat the first grade. Mr. Panico, in June 1977, requested a Core Evaluation of Michael, which was done. For reasons not relevant to this lawsuit, no Individualized Education Plan ("IEP") was developed for 1977-78.

Michael continued to exhibit problems during the 1977-78 school year. At his parents' insistence, physicians at the Massachusetts General Hospital tested Michael and, on the basis of their report, an IEP was developed for Michael and implemented in March 1978. The report showed that, although of superior intelligence, Michael had problems in spatial relationships which affected his reading and writing. Dr. Ira Lott, a member of the Massachusetts General Hospital team, also noted that Michael had developed some secondary emotional difficulties. Pursuant to the Plan, Michael spent five hours each week with a reading specialist, and he was to re-

ceive counseling once a week. Michael's parents and the administrative and academic specialists at the school monitored Michael's progress during the year, and, in the spring of 1979, Jean Arin, the Core Evaluation Administrator for the Burlington schools, suggested another evaluation. Before, during and after the evaluation, Michael's parents had numerous telephone discussions and meetings concerning the nature of Michael's difficulty and the future course proposed for Michael by the school. The parents were exceedingly anxious about Michael. They were also clearly dissatisfied, not only with the Town's assessment of his problems, but also the manner in which the Town had responded to Michael in the past and the program it devised for the future. As a result, many of the discussions with school officials were marked by misunderstandings and failures of communication.

The Town had, by May 1979, determined that Michael's general mental ability was "high average" or "superior," but that his ability to read was below age level. He had some memory deficits and a limited attention span. He was easily distracted and had difficulty completing tasks. Although he had developed some defense mechanisms to deal with his academic problems, he was frustrated by his inabilities. He suffered from migraine headaches and was found to have low self esteem and little self confidence in academic areas. At the team assessment meeting on June 4, 1979, which Michael's parents and school personnel involved in Michael's evaluation attended, Jean Arin recommended that Michael be placed in the classroom of John McAleer during the next academic year. Mr. McAleer's class provided a highly structured setting for a smaller number of children (six during 1979-80) with special academic and social needs. Ms. Arin reiterated the recommendations in the IEP which she prepared on June 26, 1979.

Mr. Panico rejected the IEP on July 3, 1979. During the summer he enrolled Michael at the Carroll School and re-

quested a hearing relative to the IEP from the BSEA. The hearing officer, by a decision rendered in January 1980, also rejected the IEP and determined that the Carroll School was the least restrictive, adequate program for Michael. She accordingly ordered the Town to pay the tuition and transportation costs associated with Michael's attendance at the Carroll School. The ruling of the hearing officer was based, not on a perceived inadequacy of the Plan but, rather, on her judgment that the Town was unable to implement it. The hearing officer doubted that John McAleer was experienced enough for the task and she found his classroom an inappropriate placement.*

B. *Michael's learning disability and special education needs.*

The parties are in agreement that Michael suffers from a learning disability and a great deal of resultant anxiety. While the precise nature or origin of his difficulty is in dispute, it appears to be undisputed that Michael's attention deficit is a substantial responsible factor. Two experts who are exceptionally well qualified in the field of learning disabilities testified at the trial. Dr. Levine, who was called as a witness by the Panicos, determined, after lengthy and complete neurological, psychological and physical examinations of Michael, as well as extensive testing, that Michael had a significant visual processing problem and a primary attention deficit. Although Dr. Levine regards the first problem as the more serious, he does opine that Michael's difficulties with visual analysis interact with his attention deficits to create "a synergistic affect that has

* The hearing officer's decision was greatly influenced by her finding that the Town had failed to comply with "educational and procedural mandates" and her further finding of "substantive and continuing procedural irregularity." These violations of state regulations, even if they were substantial, cannot, however, affect the determination under federal law of what the "appropriate" placement was.

compromised skill acquisition." Dr. Kinsbourne, who gave testimony on behalf of the Town, did not again examine and test Michael but instead studied existing test results, teacher evaluations and reports, and the transcript of the administrative hearing. He interviewed administrators and teachers at the Pine Glen School and, in particular, Mr. McAleer whom he also observed in the classroom. On the basis of that body of information, Dr. Kinsbourne, while acknowledging Michael's difficulty in organizing material and his directional confusion, attributes those problems and Michael's learning disabilities primarily to attention deficit.

Because the experts are in substantial agreement as to the manner in which Michael should be helped, I need not resolve the differences in their diagnoses, if indeed they are anything other than differences in emphasis. Both recognize that Michael needs individualized help in school, that he needs a multi-sensory and varied approach to reading, that he needs help in organizing material, that he needs to be encouraged to work independently, and that his teachers need to be aware of his attention deficit and be responsive to his needs. The experts' recommendations for meeting those needs differ only in one significant respect. While Dr. Levine suggests continued use of the Orton-Gillingham method and the strong phonetic training associated therewith, Dr. Kinsbourne prefers other approaches such as "Language Master" or the Helen Grush materials, which he views as closely related to Orton-Gillingham, yet more flexible. I find Dr. Kinsbourne's reasoning more persuasive. Michael had been taught according to the Orton-Gillingham method during the 1978-79 school year. He had mastered phonics, but was unable to become fluent. Moreover, his progress at the Carroll School, although good, did not significantly narrow the gap between his reading ability and the level of ability appropriate to his age.

C. *The IEP and the Town's ability to implement it.*

The IEP states that the objectives to be achieved for Michael by the Plan are to improve his reading and handwriting skills, to increase auditory and visual sequential memory processing skills, to continue his academic growth in all other areas, to increase his self-confidence, to improve his attention span and diminish distractibility, and to have him develop positive independent work habits for task completion.

I find those objectives dovetail in substantial measure with Michael's needs as found by both experts. Moreover, as far as it goes, the outline of Michael's learning style and physical constraints described in the IEP correspond to the views of Drs. Kinsbourne and Levine. The latter, of course, present far greater detail and deeper analysis. The Plan called for placement in Mr. McAleer's class where Michael was to receive small group and individual instruction for all language arts work. In that setting, Mr. McAleer was also assigned to work with Michael to overcome his attention problem. For music, art, and gym classes, Michael was to be integrated into the regular education program of the school and he was to take lunch and recesses with the children in the regular program. Furthermore, the IEP sets forth Michael's present levels of performance and provides for objective evaluation procedures.

The IEP was reasonably calculated to enable Michael to receive educational benefits. Michael would have been placed in a small class. The program was highly structured, with a well-integrated system providing immediate gratification through tangible rewards, as suggested by both experts. The IEP provided a means for Michael to achieve concentration skills, improved study habits, and increased word recognition and reading skills, taught through a method specifically tailored to him and his individual needs, closely related to the Orton-Gillingham method urged by both Dr. Levine and the Carroll

School, yet more creative and individualized. I find that the IEP was appropriate to meet Michael's needs.

The question remains whether the Town was able to implement the IEP. Mr. McAleer has been a special needs teacher for eight years, and he has a masters degree in special education. During the 1979-80 school year his class included six children from the second, third and fourth grades. Michael would have been one of the third graders. The classroom was divided physically into separate sections each of which served a different function—academic work, free time and game playing. Mr. McAleer, who was assisted in this class by another teacher, Adrienne King, works with each child individually for certain projects and groups of children with similar needs for other projects. The class is highly structured in the sense that Mr. McAleer established explicit rules of conduct and the children understood his expectations. At the same time he provided incentives and rewards to the children for academic and behavior achievements.

I find that Mr. McAleer was fully aware of Michael's needs and that he was able to carry out the provisions of the IEP. He had taught at least three other children with problems similar to Michael's during the five-year period preceding 1979 and understood the need for firmness with flexibility.

CONCLUSIONS OF LAW

The Act provides federal money to assist state and local agencies in the education of handicapped children. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 50 U.S.L.W. 4925, 4926 (U.S. June 28, 1982). To qualify for federal funds, a state must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate education." 20 U.S.C. § 1412(1).

To ensure a child's right to an appropriate education, the Act mandates, as an eligibility requirement of the states, that the local educational agency ("LEA") establish an IEP for each handicapped child, to be reviewed and revised at least annually. Secs. 1412(4), 1414(a)(5). The IEP must contain (1) a statement of the present levels of educational performance; (2) a statement of annual goals including short term instructional objectives; (3) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs; (4) the projected date for initiation and anticipated duration of such services; and (5) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. Sec. 1401(19).

The Act also imposes procedural requirements upon recipient states. Parents or guardians of handicapped children must be kept informed with respect to any proposed changes in the "identification, evaluation, or educational placement of the child or the provision of a free appropriate education to the child," and they are entitled to bring a complaint about any matter relating to the child's evaluation and education. Sec. 1415(b) (1) (C) and (E). A parent who is dissatisfied with the IEP developed for a child may appeal the LEA's prospective program. Sec. 1415. Parents have a right to an "impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency." Sec. 1415(b)(2). The statute provides further that parties aggrieved by the decision of the state educational agency shall have the right to bring a civil action in a district court of the United States, and that such court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing

its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." Sec. 1415(e)(2).

A handicapped child's right to a free appropriate public education entitles him or her to no more than "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley, supra,* at 4933.

"Almost as a checklist for adequacy," in its definitional section, the Act sets forth a number of specific standards to assure that a "free appropriate education" is provided. *Id.* The instruction and services must be afforded "at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP." *Id* Sec. 1401(18). "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Rowley, supra,* at 4929.*

A reviewing court has but two inquiries; one, whether the state had complied with the procedures set forth in the Act; and, two, whether the IEP was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 4933. In deciding the first issue, a court must not only "satisfy itself that the State has adopted the State plan, policies, and assurances required by the Act, but also determine that the State has

---

* Obviously, more than one program may be appropriate. The reviewing court's role is merely to determine whether the one provided by the LEA satisfies these standards, not whether another program might also be appropriate, or even preferable. The Act does not entitle a handicapped child to the best possible education, merely a free appropriate one. *Bales v. Clarke,* 3 E.H.L.R. (CRR) 553:209 at 211 (E.D. Va. Oct. 16, 1981).

created an IEP for the child in question which conforms with the requirements of § 1401(19)." *Id.* at n.27.

Massachusetts has conformed with all of the Act's procedural requirements. The parents have been afforded the right to complain about the IEP proposed by the Town and have appealed to the state level. They do not in any respect dispute the manner in which those procedural rights have been affected. The proposed IEP conforms with §1401(19). It states Michael's present levels of educational performance, goals to be obtained as well as short term objectives, specific educational services and involvement in regular educational programs, time frames in which the program is to be applied, and objective evaluation procedures. The court is satisfied that Massachusetts has fully complied with the Act's procedural requirements.

The services promised in the IEP conform to the checklist in the Act. They were to be provided at public expense and under the supervision of the public schools, performed by a qualified special needs teacher in a classroom conforming to the State's special needs requirements and conducted within a regular school setting, with reference to the grade levels used in the regular classroom, integration into the regular classroom, and work materials similar to those used in regular classes as disirable. I also find, contrary to the finding of the state agency, that the Town was fully able to conform to the child's IEP which was, as I have already noted, in accord with the statutory requirements. Michael would have benefited from the personalized instruction and supportive services provided in the IEP.

Therefore, the Town has met its burden of demonstrating, by a preponderance of the evidence, that the placement in Mr. McAleer's class at the Pine Glen School was appropriate for the school year 1979-80. I find that the parents have failed to meet their burden of showing that for subsequent years such placement would have been inappropriate. Accordingly, the

Town is not responsible for the cost of Michael's education at the Carroll School for the academic years 1979-80 through 1981-82.

The parents have also sought reimbursement for certain medical expenses incurred as a result of extensive evaluations conducted on Michael in 1977 and 1978. These include an evaluation by Dr. Melvyn Levine in June 1977, and a neurological examination by Dr. Ira Lott in December 1977, conducted as a result of a referral by Dr. Levine. In addition, the parents seek reimbursement for tests conducted at Dr. Lott's recommendation at the Massachusetts General Hospital, and a subsequent follow-up neurological examination and evaluation by Dr. Lott in March 1978.

Under the federal and state regulations, parents are entitled to have independent evaluations conducted at public expense if they disagree with an evaluation obtained by the public agency, 34 C.F.R. 300.503(b), where they have notified the LEA in a timely manner that they intend to seek such evaluation, 603 C.M.R. § 328.3; *see also Norris v. Massachusetts Department of Education*, 529 F.Supp. 759, 769 (D. Mass. 1981). In addition, the team evaluation of a child, required by the Massachusetts regulations, 603 C.M.R. § 311, requires the input of a physician, who may, at the parents' request, be the child's own physician. 603 C.M.R. § 311.4. The regulations make no mention of the cost of the physician's required evaluation, although 603 C.M.R. § 311.10, part of the same section, specifically provides that a professional outside the school system, currently working with the child, may also participate but only at the parents' expense. Furthermore, correspondence from Jean Arin to the parents relative to the team evaluation meeting specifically informs them of their right to have their own physician conduct the assessment, and makes no reference to costs or to any other options available to them. I conclude, therefore, that Dr. Levine's June 1977 evaluation

shall be considered the physician's report required for the June team meeting and that its expense should be borne by the Town.

However, with respect to the subsequent referral to Dr. Lott and the testing conducted by him, there is no evidence either that it was the equivalent of similar evaluations conducted by the Town with which the parents disagreed or that the parents gave the Town prior notice that they intended to seek further testing. The notes of Jean Arin, admitted as evidence at the BSEA hearing, and at the trial, point to a finding, which I make, that the school was informed of the test results after they were conducted. While the Act entitles handicapped children to free evaluation under certain circumstances, parents may not unilaterally elect to have their child evaluated by private specialists and expect the LEA to pick up the bill. Therefore, the parents are not entitled to reimbursement of these expenses.

Within 20 days the Town shall submit a form of judgment in accordance with this decision.

August 13, 1982
Date

_____
Rya W. Zobel
District Judge

John DOE, Jane Doe, Joseph Doe, Plaintiffs,

v.

Dr. Gregory ANRIG, Massachusetts Commissioner of Education, Defendant.

John ANGIER, Judith Angier, and John Angier, Jr., Plaintiffs,

v.

Dr. Gregory ANRIG, Massachusetts Commissioner of Education, and the Wayland School Department, Defendant.

TOWN OF BURLINGTON and the School Committee for the Town of Burlington, Plaintiffs,

v.

The DEPARTMENT OF EDUCATION OF the COMMONWEALTH OF MASSACHUSETTS and John Doe, as he is father and next friend of John Doe, Jr., Defendants.

Civ. A. Nos. 79-909-Z(A), 79-2144-T(A) and 80-0359-Z(A).

United States District Court, D. Massachusetts.

March 7, 1983.

Anne M. Vohl, Burlington, Mass., David Berman, John F. Zamparelli, Town Counsel, Medford, Mass., for plaintiffs.

Linda M. Irvin, Terry Jean Seligmann, Asst. Atty. Gen., Boston, Mass., for defendants.

Diana S. Gondek, Boston, Mass., for School Committee of Westwood.

Gerald B. Gallagher, Acton, Mass., David Rosenberg, Hill & Barlow, Boston, Mass., for defendant John Doe and John Doe, Jr.

Ellen Janos, Asst. Atty. Gen., Boston, Mass., for defendant Dept. of Educ.

Jeffery Jones, Palmer & Dodge, Boston, Mass., for Town of Wayland School Committee.

Bruce E. Mohl, Asst. Atty. Gen., Boston, Mass., Jim Oliver, Boston, Mass., John Graceffa, Weymouth, for Anrig.

OPINION

BAILEY ALDRICH, Senior Circuit Judge.*

This opinion consolidates three cases raising questions of the right to reimbursement for tuition and travel expenses for handicapped children paid during review proceedings testing the correctness of the school committee's educational and placement decision. The statutes involved are the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401 *et seq.*, and its counterpart, Mass. G. L. c. 71B (Massachusetts law). The cases embraced are the *Town of Burlington v. Department of Education,* 1 Cir., 1981, 655 F.2d 428 (*Burlington*), here on remand; *Doe v. Anrig,* 1 Cir., 1982, 692 F.2d 800 (*Westwood*), also on remand; and *Angier v. Anrig (Wayland*), a new case. *Burlington's* child is Michael, *Westwood's* is *John and Wayland's* is Junior. All are admittedly

---

* Sitting by designation.

handicapped; their correct placement has been finally determined,[1] and the only remaining issue is reimbursement.

Facts
Burlington

During the school years 1977-78 and 1978-79 Michael experienced learning problems in the second and third grades at a public school, Memorial. An IEP was prepared for him in the spring of 1979 for a special program at another public school, Pine Glen. The father sought review by the Department of Education's Bureau of Special Education Appeals (BSEA). Prior to the commencement of the hearings in September, he transferred Michael, at his expense, to Carroll School, a private school specially qualified to teach handicapped children. In January, 1980 the BSEA upheld his decision and ordered the town to repay him for past, and to pay the future Carroll tuition, informing the town that it might seek review in either state or federal court. The town responded with an appeal to this court, naming the Department and the father, with one count seeking EAHCA review, and a pendent count seeking a state type review. It sought, unsuccessfully, a stay of the BSEA's order requiring it to make interim payments to Carroll, and appealed from that ruling. (Appeal #1) When threatened by the Department with a cut-off of all special education funds, the town agreed, without prejudice, to make the current, but not past, payments. On the merits, the court thereafter granted summary judgment against plaintiff town on the state count, concluding that the BSEA's decision was supported by substantial evidence. The town appealed that order as well. (Ap-

[1] This is not true as to *Wayland*, but is assumed in the parents' favor for purposes of Wayland's present motion for summary judgment.

peal #2) Subsequently defendants obtained a preliminary injunction enforcing the BSEA's order to reimburse past tuition without awaiting final determination. The town appealed therefrom. (Appeal #3)

[1,2] Thus there were three appeals which the court took, aided by a certification under F.R.Civ.P. 54(b), prior to a trial on the merits of the federal count as to the appropriateness of Michael's IEP. The court's first action was to order a dismissal, on the merits, of the pendent state count, Appeal #2. The state standard of review of an agency decision is the customary one, requiring the petitioner to show the decision was unsupported by substantial evidence. The special federal review under section 1415(e)(2), a provision apparently drawn by proponents of judicial activism, calls for a full trial de novo, with additional evidence, the court to make its own factual determination based on a preponderance of the evidence.[2] Pointing out that a state type review could lead to an affirmance of the BSEA's decision, while an EAHCA review could pro-

---

[2] The writer of this opinion in no way minimizes the importance of providing special education for handicapped children. However, with the enormous demands, criminal, for which there must be a speedy trial, and civil of all sorts, upon a limited number of federal judges, the concept that each handicapped child in the country who is receiving federal aid should be entitled, after he has already received a comprehensive agency hearing and a formal review, *see* Mass. G. L. c. 71B, § 3; 20 U.S.C. § 1415(b)(2) & (c), to a trial de novo of the appropriateness of his allotment seems entirely out of balance with national demands. In the *Burlington* case alone, for one child, there were 577 pages of administrative transcript, considerable documentary evidence, and new live expert testimony, together submitted to the court for a full redetermination. The activities of counsel led to 198 docket entries prior to the first appeal, with over 100 more to date. Admittedly this is unusual, but counsel entitled to trials de novo are often not given to restraint.

By the same token, the statute is self-defeating. An IEP determination necessarily calls for prompt implementation. The statute, quite properly, calls for a continuation of the status quo until final review. Section 1415(e)(3), post. As a practical matter, one may ask in how many cases will a trial de novo be accomplished before the pertinency of the IEP has expired?

duce a reversal, on Appeal #2 the court held that such inconsistency would violate the federal act. The state count was accordingly dismissed, leaving the federal count for trial.

On Appeal #1 the court upheld the denial of the stay, ruling that the town had not shown irreparable harm, viz., had not shown that the father would not be able to repay the tuition if he ultimately lost. Similarly, on Appeal #3 the court ruled the father had not shown irreparable harm in not being reimbursed forthwith for past tuition. The whole tenor of the opinion in remanding for trial of the federal count on the merits was that reimbursement could be had, either by the father or by the town depending on the ultimate finding. Following remand and a trial, another judge of this court found the town's IEP to have been appropriate for all three years and, accordingly, ruled that the town was "not responsible for the cost of Michael's education at the Carroll School for the academic years 1979-80 through 1981-82." For reasons that will be come to, both parties, however, seek reimbursement for what they have paid.

Westwood

John's disability—Down's Syndrome—was so severe that he had been maintained almost since birth at Crystal Springs School, a residential facility, at his parents' expense. In 1975 they sought an IEP, hoping to pass some of this expense on to the town. Westwood's first response was an IEP for non-residential placement in public school after a final transition year of continued residential placement. The parents objected to this, and the parties negotiated a cost-sharing agreement for continued placement at Crystal Springs. In September, 1977 the parents requested a new IEP, and on November 15 one was issued for non-residential placement in a public school, commencing immediately. The parents rejected this second IEP and appealed to the BSEA, which in due course found the IEP generally appropriate. The parents sought review in

this court. At all times John remained at Crystal Springs. After trial, the district court's opinion stated that a residential placement was appropriate for the year 1977-78, and that the town was responsible for the tuition and expenses for that year. The judgment said nothing about reimbursement.

On appeal the court affirmed the district court's Crystal Springs placement decision, but discovered problems with respect to reimbursement. First, it held that section 1415(e)(3), requiring interim continuance of placement, had nothing to do with the eventual settling of accounts. The court then turned to section 1415(e)(2) and declined to construe its authorization language, to "grant such relief as . . . is appropriate," as providing for reimbursement. Rather, the court ruled that although the parents would have been relieved of all expense had the town made the correct decision in the first place, they could not now be awarded reimbursement. For this it cited *Anderson v. Thompson*, 7 Cir., 1981, 658 F.2d 1205, a case, it so happened, from the visiting writing judge's circuit. The court stated that the First Circuit had never considered this issue before, making no-mention of its apparent rulings in *Burlington*.

Again citing *Anderson v. Thompson*, the *Westwood* court indicated there could be two exceptions to its general ruling against reimbursement; one, if the change effected by the parents was necessary to protect the physical health of the child, and two, if "the school officials have acted in bad faith by egregiously failing to comply with the procedural provisions of the Act," 692 F.2d ante, at 811. Admittedly, neither exception was presented.

The court then turned to the pendent state claim, and observed that Massachusetts permitted reimbursement in some instances, citing *Amherst-Pelham Regional School Committee v. Department of Education*, 1978, 376 Mass. 480, 381 N.E.2d 922. Pointing out that the present circumstances were somewhat different, the court said that it would not decide the

Massachusetts law itself, and remanded for that purpose. The court failed to note that in *Burlington* it had ordered the pendent state count dismissed because of conflict and consequent preemption.

Wayland

During the fall of 1977 Junior, a second grade student at Loker, a public school, was placed in a diagnostic IEP, and in December was given an IEP which the parents accepted for the time being although, contrary to the statutory requirements, they had been excluded from the hearing. The IEP called for continued placement, but with special services, at Loker. The winter of 1978 did not go smoothly, with Junior unable to perform school work adequately. Wayland recommended an outside summer program, at the parents' expense. Junior undertook a program at Carroll School. In August the parents rejected the 1977 IEP, and shortly thereafter enrolled Junior at Carroll for the 1978-79 school year. They requested funding for an independent evaluation of Junior at the Children's Hospital. When this was refused they proceeded with the evaluation nevertheless, and submitted it to Wayland on November 2, 1978. On November 27, they inquired why no IEP was being prepared, and only on January 19, 1979 did Wayland produce a new one. This varied little from the former, and, again, the parents had not been notified to participate. They immediately rejected this plan, and appealed to the BSEA. No hearing was held until April, and as soon as it started the officer disqualified himself. The hearing was recommenced in June. While it was progressing Wayland submitted IEP #3 for the forthcoming year to the parents, again with little change. This time the parents were given a week's notification of the hearing by mail, but on receipt they replied, by telephone, that it did not give them time to consult with their attorney, who was away, and that they did not feel they should attend without her advice.

Wayland made no apparent effort to reschedule, and again prepared an IEP without the parents' involvement, who then rejected it.

The BSEA thereafter held for Wayland, ruling that, despite various procedural violations, Wayland's second and third IEPs were appropriate. The parents filed suit in this court in October, 1979. Wayland conducted no review for the years 1980-81 and 1981-82. For 1982-83 the parents requested an IEP relating to reentry by Junior into public school, and an IEP acceptable to both parties was arrived at and initiated.

Procedural Matters

Pendent Jurisdiction

[3] The state law claims, to the extent that any exist, are so tied in, both factually and legally, with the federal claims that the court, in the exercise of its discretion, declines to dismiss any on the ground of insufficient pendent jurisdiction.

Certification

Some of the parties wish questions to be certified to the Massachusetts Supreme Judicial Court, and the Court of Appeals has indicated in *Westwood,* but not dictated, that this might be done. The court has considered the matter, but declines to do so, in part because, until the Court of Appeals has resolved all the federal questions raised herein, it will be difficult to be sure just what questions it might be desirable to certify.

Issues

Burlington

(1) The father seeks reimbursement for the 1979-80 tuition he paid to Carroll, as well as 1979-80 travel expense, and

(2) seeks town payment of the balance of 1981-82 tuition owed Carroll.

(3) The town seeks reimbursement for the Carroll tuition and travel expense it paid for in 1980-81 and 1981-82 as a result of the ultimately reversed BSEA order and the Department's threat to cut off all funds.

Involved in these issues is the question whether Michael's transfer to, and continued placement at, Carroll was in violation of section 1415(e)(3).

Westwood

John's placement at Crystal Springs, although contrary to the IEP, preceded it. Accordingly, this continuing placement was required by section 1415(e)(3). However, when it finally proved to be correct, the town declined to reimburse the parents for the expenses which, had it made a proper IEP, it would have been obliged to pay from the beginning. This presents the question of the parents' right of reimbursement, (4) under federal law, and (5) under Massachusetts law.

Wayland

The parents, after the IEP, and contrary to section 1415(e)(3), transferred Junior to Carroll. The BSEA upheld the IEP. In this court the parents seek to overturn the BSEA and the IEP and obtain reimbursement for the Carroll tuition and travel expense. The town moves for summary judgment, arguing that even if after a hearing on the merits this court should reverse the IEP, the parents would not be entitled to reimbursement. Accordingly, question (6) is whether the parents, having made a transfer contrary to section 1415(e)(3), nevertheless may in the particular circumstances recover tuition if their choice is ultimately upheld.

Conclusions

Burlington

If this court were to follow the language and seeming rationale of the court's *Burlington* opinion, the answer to all

three questions would seem plain, and to depend simply on who was the ultimate winner with respect to the IEP, viz., the town. The father contends otherwise. In view of the complexities raised, questions (1)—(3) will be left to last.

Westwood

With the greatest respect, this court states that it finds itself unhappy with the Court of Appeals' decision in this case. John's parents were in a bind. Under section 1415(e)(3) they were clearly entitled, as the court recognized, to retain John in his placement at Crystal Springs, but were obliged, under the existing cost agreement, to continue to pay John's expenses. Indeed, but for the agreement, they would have had to pay tuition as well.[3] To have moved him to public school, pending review, would have effected exactly the interruption section 1415(e)(3) was designed to prevent, and would have seriously diminished the value of their success, if they achieved it, viz., by the interruption of two transfers. However, when it was determined that Crystal Springs was, substantively as well as procedurally, the correct placement, the court says that, at least under federal law, the parents must still foot the bill. Having in mind that, in addition, they must pay counsel, this is surely a Pyhrric victory. Although the court noted that section 1415(e)(2) permits the court "to grant such relief as . . . is appropriate," it held, without discussion, except to rely on *Anderson v. Thompson,* ante, and *Miener v. Missouri,* 8 Cir., 1982, 673 F.2d 969, *cert. denied,* —— U.S. ——, ——, 103

[3] "Section 1415(e)(3) is designed to preserve the status quo pending resolution of administrative and judicial proceedings under the Act. It amounts to an automatic stay preventing any change in a child's location and educational program, except by agreement of the parties. The section has been interpreted—correctly, we think—to require that whoever was paying for the placement prior to review shall continue to do so while review is pending." 692 F.2d, ante, at 810. (Citation omitted.)

S.Ct. 215, 230, 74 L.Ed.2d 171 which followed *Anderson*, that it was not appropriate to require the town to pay what it properly should have paid in the first place.

If one looks to *Anderson v. Thompson*, for the reason for this result, it is that the court found no Congressional intent to subject towns to claims for "damages." Extrapolating largely from the shortness of available funds, the *Anderson* court concluded,

> "When a school district makes a good faith effort to provide a child with an appropriate education, we do not believe that as a general rule it is good policy to require that a school district pay money damages if it later turns out that a different programming decision should have been made.
>
> . . . .
>
> "[A] general damage remedy would hinder rather than help the very children for whose benefit the statute was enacted." 658 F.2d, ante, at 1213.

In this court's opinion, with respect, the *Anderson* court failed adequately to note the difference between general damages, which could be a very serious matter, and reimbursement for tuition payments that would have been the town's responsibility under the appropriate IEP. For the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection that Congress would have intended, however great the shortage of funds. For a further discussion and citation of cases, see *Matthews v. Ambach*, W.D.N.Y., 1982, 552 F.Supp. 1273, 1278-79.

[4, 5] This court, while it would hope that the Court of Appeals might reconsider its *Westwood* decision, is bound

thereby, and can do nothing for the parents under EAHCA, question (4), and so turns to its instruction to consider the Massachusetts law, question (5).[4] Reimbursement to the successful parent was ordered in *Amherst-Pelham Regional School Committee v. Department of Education,* 1978, 376 Mass. 480, 381 N.E.2d 922. It is true that the court granted relief based on a regulation that provided for reimbursement if the BSEA upheld the parents' decision, whereas, in the present case, the BSEA did not and it was this court that did so. However, there had been a claim even in *Amherst-Pelham* against the regulation, as going beyond the statute and the court stated that it would give deference to the agency's views that reimbursement furthers the statutory aims. This court believes that the Massachusetts court would continue that approach, and construe the regulation as embracing a decision of this court when it, although not the BSEA, determines that the IEP should have adopted the parents' view. It holds for the parents on the pendent Massachusetts count, question (5).

Wayland

[6] The court has no difficulty in deciding question (6) in favor of the parents, in spite of their having disregarded the IEP, as it considers the case to fall squarely within the second *Anderson v. Thompson* exception, if "school officials have acted in bad faith by egregiously failing to comply with the procedural provisions of the Act," recognized in the *Westwood* opinion, 692 F.2d, ante, at 811. Obviously every procedural

---

[4] Contrary to defendant's claim, the complaint and papers throughout this case sufficiently raised, although perhaps not as clearly as would be desirable, a claim for reimbursement. If there has been any misunderstanding, the pleadings and/or pretrial order can be amended. There is no prejudice, as the questions are legal and not factual, and full opportunity for briefing has been provided. The court, indeed, would compliment the Attorney General on his brief, even though it largely does not agree with it.

violation does not equal bad faith. On the other hand, some specified procedures may be so important, substantively, that subjective good faith, even if there were such, cannot protect against gross disregard. The presence of parents with their input is of utmost importance for the child's sake, and perhaps for their own as well. It is provided in the Massachusetts regulation, 603 C.M.R. § 311.7, that a parent "shall" be a member of the TEAM. The federal regulation further provides, 34 C.F.R. § 300.345,

> Parent Participation.
> (a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
> (1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and
> (2) Scheduling the meeting at a mutually agreed on time and place.

Wayland gave the parents no notification whatever of the 1978 meeting. It gave only short notice in 1979, and apparently made no attempt to postpone. In addition, 34 C.F.R. § 300.343, requires annual review of the IEP. This requirement, too, was violated, since no meetings with respect to Junior were conducted between June, 1979 and spring, 1982.

The primary importance of the Act's procedural safeguards was pointed out in *Anderson v. Thompson*, 658 F.2d, ante, at 1211, 1214. *See, also, Board of Education v. Rowley* (1982) _____ U.S. _____ & n. 6, 102 S.Ct. 3034 & n. 6, 73 L.Ed.2d 690. To reward Wayland for their flagrant disregard by requiring properly acting parents to pay bills which, on the appropriate IEP, the town should have paid from the start, would offend the clear spirit of both the EAHCA and the Massachusetts statute. Possibly the parents' input would have

resulted in a different IEP in the first place. In any event, it would be difficult to think of a better way to encourage committee irresponsibility. Nor, finally does the court accept the argument that Junior was moved before the 1978, and subsequent, violations. The transfer followed a similar 1977 disregard. It was not a waiver for all time that the parents first tried to see if the 1977 IEP would work. Thus if, on the merits, the parents' placement is ruled to be the correct one, Westwood's exception to its general rule against reimbursement would permit recovery.

Burlington Revisited

The Court of Appeals remanded *Burlington* for determination of the correctness of the IEP. Now that it has been sustained, and the town declared not responsible for the 1979-80 through 1981-82 years, the father says that, nevertheless, and in spite of the seeming directions in the court's opinion, he should be reimbursed for his 1979-80 payments and the unpaid 1981-82 tuition, and should not have to reimburse the town for its 1980-81 and 1981-82 payments. Although only by reading *Westwood* as implicity contradicting the *Burlington* court's opinion do these matters still seem open, we address his contentions.

The court believes a threshold question to be whether Michael's transfer to Carroll in September, 1979 contrary to the IEP, was a violation of section 1415(e)(3). This section provides,

> "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then *current* educational *placement* of such child, . . ." (Emphasis suppl.)

No question regarding this section was apparently raised in the district court until February, 1981. In connection with its

then order that the town reimburse the father pendente lite for the 1979-80 tuition, (Appeal #3), the district court, referring to this section, stated,

> "This mandatory provision, designed to preserve the status quo, has been held in this case to require that John Jr. be maintained at the Carroll School during the pendency of this litigation. Judgment and Memorandum of Decision November 19, 1980."

In fact, its November memorandum and order had not mentioned it. Rather, it had noted, for purposes of the state count, that the BSEA had held Carroll School to be the appropriate placement. Not only was the federal statute not mentioned, but the court did not address the factual circumstance that the father had transferred Michael to Carroll during the review process, after the IEP. A close reading of the *Burlington* opinion, in turn, indicates that the Court of Appeals also proceeded under the assumption that Carroll was the "current . . . placement." The language of the opinion, and the recitation of the facts at the start, however, indicate that this was a mistaken impression of the facts rather than a legal conclusion. Nor did anything turn on its correctness.

[7] This court does not read section 1415(e)(3) as authorizing a parent to reject an IEP, unilaterally move the child to a private school, claim this to be the "current . . . placement" from then on, and then, even when the transfer proves to have been unjustified, still expect the town to pay the bills. *See Stacy G. v. Pasadena Independent School District,* 5 Cir., 1983, 695 F.2d 949; *Stemple v. Board of Education,* 4 Cir., 1980, 623 F.2d 893, *cert. denied,* 450 U.S. 911, 101 S.Ct. 1348, 67 L.Ed.2d 334. This would be to turn inside out a statute designed to hold matters in abeyance, and to respect

the existing placement.[5] To permit reimbursement when the parents, without excuse, unilaterally transferred the child to a private placement during the review process could only serve to encourage parents to disregard the statutory scheme; they would have nothing to lose. The fact that in this case the transfer also ultimately proved incorrect only reinforces this conclusion.

[8] Faced with this federal difficulty, and despite the fact that *Burlington* was not encouraging on the applicability of state law, the father would now rely on a state regulation, 603 C.M.R. § 504.5(f), which provides for reimbursement if a parent's placement contrary to an IEP is upheld by the BSEA. He argues that this regulation provides for reimbursement regardless of whether the BSEA decision for the parents is reversed by a court, in part reasoning that parents should be able to rely on the BSEA decision. This would seem to read too much into the regulation. The court does not believe that the state court would construe this regulation to permit reimbursement when the administrative decision has been reversed by a court on appeal, or, if it so reads, would give it validity. Indeed, if it should do so, the state rule would very likely be preempted by federal law.

The father would posit a different result with regard to having to repay to the town what he had received on account of the later years, asserting a letter from the Department's counsel, an assistant attorney general construing section 1415(e)(3) in his favor. In addition to being a mere legal opinion, it was written long after he had incurred the expense.

---

[5] It is true that in this particular case Michael's IEP proposed a transfer from one public school to another public school, so that, strictly speaking, there was no proposed "continued . . . placement." However, the statute cannot be read in such circumstances to permit the parent, without town agreement, to choose some private school and confer thereon the imprimatur of continued placement.

The Department was not only mistaken on the law, it would seem even more ill-advised in threatening the town with cutting off all its funds if it did not obey its order to make future payments for Michael to Carroll until the IEP was finally determined. This was not a case where the town was legally obliged under section 1415(e)(3) to continue payments preserving the status quo, but was an interference by the Department, supported by its economic power, enforcing an order still subject to review. Certainly this could not be the basis for a final decision on liability. If the threat is to be regarded as other than wrongful, it could only be on the assumption that the payments were to be returned if the order was ultimately reversed.

The difficulty here is that the Department is in the comfortable position of not being itself accountable if proven to be in error. The Eleventh Amendment protects it even when, as a recipient and distributor of federal funds, it orders a town to make payments in violation of the federal act. *See Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n,* 1981, 450 U.S. 147, 150, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (per curiam); *Edelman v. Jordan,* 1974, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662; *Miener v. State of Missouri,* 673 F.2d, ante, at 980-82. However, there is not reason why the town should be barred from obtaining repayment from the parent on whose behalf its funds were so spent by duress. This is a different case from *Westwood;* the payments were not only not owed, they were made involuntarily.

The court is not moved by the fact, with regard to repayment, that the state and federal act provide different standards of review. As was pointed out in *Westwood,* the federal act is the name of the game, and it cannot be that the BSEA is reversed and not reversed.

In *Burlington* there remains the question of the amount of the town's recovery. The court does not accept the argument that defendant parent is entitled to offset the town's so-called average cost per student. Rather, the burden will be on defendant to show the town's actual savings, such as marginal costs it would have incurred in any case, and funds received from the state for Michael's education. The case is continued for this purpose.

In *Westwood*, judgment is to be entered for the parents.

In *Wayland*, the town's motion for summary judgment is denied; the case to stand for trial on the merits of the IEP.

TOWN OF BURLINGTON, et al.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR the
COMMONWEALTH OF MASSACHUSETTS, et al.,
Defendants, Appellants.

TOWN OF BURLINGTON, et al.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR the
COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee,

John Doe, etc., Defendant, Appellant.

TOWN OF BURLINGTON, et al.,
Plaintiffs, Appellants,
v.
DEPARTMENT OF EDUCATION FOR the
COMMONWEALTH OF MASSACHUSETTS, et al.,
Defendants, Appellees.

Nos. 83-1424 to 83-1426.

United States Court of Appeals,
First Circuit.

Argued Nov. 8, 1983.

Decided May 29, 1984.

David W. Rosenberg, Boston, Mass., with whom Hill & Barlow, Boston, Mass., was on brief, for John Doe, etc.

Ellen L. Janos, Asst. Atty. Gen., Government Bureau, Boston, Mass., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass., was on brief, for Dept. of Educ. for Com. of Mass.

David Berman, Medford, Mass., with whom Berman & Moren, Medford, Mass., was on brief, for Town of Burlington, et al.

Before CAMPBELL, Chief Judge, SWYGERT,* Senior Circuit Judge, and BOWNES, Circuit Judge.

BOWNES, Circuit Judge.

On appeal to this court a second time, all parties urge that the district court committed reversible errors in a case arising under the Education for All Handicapped Children Act (EAHCA or Act), 20 U.S.C. §§ 1401-1461. The first appeal generally involved motions for preliminary injunctions concerning the interim educational placement and funding for a learning disabled child, there referred to as John Doe, Jr.,[1] *see Town of Burlington v. Department of Education*, 655 F.2d 428 (1st Cir. 1981) (hereinafter *Burlington I*). The current appeal presents a wide variety of novel issues under the Act. These include: the choice of law to be utilized in the state due process hearings; the impact of a school system's regulatory violations on the validity of a child's IEP; the weight to be accorded to the state administrative record and the hearing officer's findings upon appeal; the meaning of the term "additional evidence" as used in the Act; the appropriate burden of proof at trial for the years subsequent to the contested IEP, and the significance of a diagnostic determination by the trial judge. Reimbursement issues include the effect of a unilateral parental transfer of the child to a school not authorized by the

* Of the Seventh Circuit, sitting by designation.

[1] At trial, the parents allowed themselves and their child to be referred to by their real names. To avoid confusion with our earlier case, we will continue to refer to the parents as Mr. & Mrs. Doe and the child as John.

individualized educational program (IEP) formulated by the school system; the impact of parental reliance on and implementation of a state administrative decision; and bad faith as a bar to reimbursement.

In view of the protracted procedural background of the case which has included two published opinions, *see id.* and *Doe v. Anrig*, 561 F.Supp. 121 (D.Mass.1983) (Aldrich, J., sitting by designation) (consolidated case including *Burlington I* on remand) we will first recount its procedural history. The factual background may be found in the above-cited opinions. We shall then review the alleged errors according to the chronological progression of the case beginning with those alleged to have occurred at the state administrative level.

Prior Proceedings

John had completed the third grade at a regular public school when his parents invoked the administrative appeals process in July 1979 to review an IEP and placement the Town of Burlington (Town) proposed to implement the following September. Mediation failed and in August the parents placed the child in a private school, the Carroll School. A state due process hearing was held by the Massachusetts Bureau of Special Education Appeals (BSEA) over four days in the autumn of 1979. The BSEA hearing officer rendered a decision in January 1980 in favor of the private school placement, holding the Town's IEP to be inadequate and inappropriate for the child's special needs. The Town then commenced a two-count action in the district court against the State and the Does, seeking to reverse the BSEA order on the basis of both the federal Act, 20 U.S.C. § 1415(e)(2), and the corollary state Act, Mass.Gen.Laws Ann. ch. 71B, §§ 1 *et seq.* The federal and state acts have different standards of review.

The district court denied the Town's request for a stay of the BSEA order that the Town fund the child's education at the Carroll School, and on the state count found in favor of the defendants on a motion for summary judgment.

On appeal to this court we, *inter alia,* vacated the grant of summary judgment and directed that the pendent state count be dismissed, holding that the "federal specification for review, when invoked, seems to us designed to occupy the field over an inconsistent state provision." *Burlington I,* 655 F.2d at 431. The federal claim was remanded for trial.

At the conclusion of a four-day trial, the district court, Zobel, J., reversed the State BSEA finding and held that the Town's IEP was adequate and appropriate. The case was then transferred and consolidated with two others to determine whether the Town's remedies included reimbursement for tuition and travel expenses. The district court, Aldrich, J., sitting by designation, determined that reimbursement was available to the Town as the prevailing party.[2] The case was transferred back to the original district court and an order issued requiring the parents to repay the Town the tuition, transportation costs, and other expenses related to the child's education at the Carroll School for the prior three years. This appeal ensued with the Department and the parents alleging both legal and factual errors in the district court. The Town cross-appeals on the limited issue of the method used to calculate the appropriate reimbursement and the amount thereby awarded. It must be emphasized that the State is not, as is usually the case, aligned with the Town on this appeal. The State's position parallels that of the Does. It urges that the district court erred in reversing the decision of the state educational agency as to the appropriate educational placement for the child.

---

[2] We later endorsed the availability of equitable reimbursement to a prevailing party in *Doe v. Brookline,* 722 F.2d 910 (1st Cir. 1983).

Statutory Overview

Since our opinion focuses on 20 U.S.C. § 1415, which is reproduced in its entirety as an appendix, some basic observations are in order. This section of the Act requires state and local educational agencies to establish and maintain certain procedural safeguards for handicapped children and their parents or guardians. § 1415(a).

Subsection (b)(1) sets forth the required procedures, which shall include, but shall not be limited to—

> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
>
> (B) [procedures when parents and guardians are not known or when child is a ward of the state];
>
> (C) written prior notice to the parents or guardian of the child whenever such agency or unit—
>
> (i) proposes to initiate or change, or
>
> (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;
>
> (D) [notice of all available procedures required to be in parents' or guardian's native language];
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

Subsection (b)(2) provides for a hearing:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. . . .

Subsection (c) gives "any party aggrieved by the findings and decision rendered" in the hearing under (b)(2) the right of an "appeal to the State educational agency which shall conduct an impartial review of such hearing." Subsection (d) enumerates the rights accorded parties to hearings.

Subsection (e)(2) opens the courtroom doors to any party aggrieved by the decisions rendered under subsections (b) and (c) by providing that such party

> shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Subsection (e)(3) is addressed to the placement of the child during the pendency of the section 1415 proceedings. Subsection (e)(4) vests jurisdiction in the district courts of the United States.

[1, 2] For the reasons set forth in detail in the main part of our opinion, we find that § 1415 gives the federal court the authority to enforce both federal and relevant state law. "Relevant" state law is law which is not inconsistent with the federally-mandated requirements — both substantive and procedural — of the Act. "Relevant" state law includes, *inter alia*, procedural safeguards which are more stringent than the required procedures set forth in subsection (b). This is made evident by the first sentence of the subsection: "The procedures required by this section *shall include, but shall not be limited to . . . ,*" § 1415(b)(1) (emphasis added). State law that is inconsistent with the federally-mandated procedures cannot, of course, be enforced by a federal court; it is not within § 1415(e)(2) jurisdiction. In this case, we deal with state statutes and regulations that are consistent with but higher than the federally-mandated standards. Section 1415 mandates that the federal court enforce such statutes and regulations. We now turn to an exegesis of the federal Act and an analysis of the specific issues.

I. THE STATE ADMINISTRATIVE PROCEEDINGS

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme Court discussed the proper scope of judicial review in actions brought under 20 U.S.C. § 1415(e)(2): "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-07, 102 S.Ct. at 3051 (footnotes omitted). In view of the state hearing officer's findings that the Town violated numerous state and federal laws in handling the child's

special educational plans, the State and the Does — appellants here — challenge the failure of the district court to determine whether the Town complied with the procedures mandated by the federal Act and the corollary state Act. The Town responds by arguing that the hearing officer's findings were essentially *ultra vires*. The resolution of this question requires us to determine whether the state due process hearing, a central feature of the federal Act, was defective.

The appellants urge as error the district court's refusal to give any weight to the hearing officer's determination that the Town violated numerous state substantive and procedural regulations plus several federal provisions in its handling of the child's special education. The Town's response is that findings concerning past practices regarding compliance with state educational standards and procedures were irrelevant to the question appropriately before the hearing officer, *viz.*, is the IEP proposed by the Town adequate and appropriate? Thus, in the Town's view, the district court properly ignored those findings. The Town raises two other objections to the findings. First, it argues that it was not given fair notice of the procedural or reimbursement issues in violation of the due process clause of the fourteenth amendment, U.S. Const. amend. XIV, § 1, and the Massachusetts Administrative Procedure Act, Mass. Gen.Laws Ann. ch. 30A, § 11(1) (West 1979), and, second, that the hearing officer's consideration of the prior years of the boy's education was unnecessary and erroneous. We first address the question of notice.

A. *Fair Notice*

We note at the outset that the impartial due process hearings authorized by the Act are to be conducted in accordance with state law. 20 U.S.C. § 1415(a).[3] This principle is limited only

[3] Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall

where the federal Act and regulations mandate different or more stringent procedural protection on a given point than does state law. *See* 20 U.S.C. § 1415(b)(1) ("The procedures required by this section shall include, but shall not be limited to . . ."). In regard to notice, the federal Act speaks only to "written prior notice to the parents or guardian of the child" regarding certain actions a state or local educational agency might take in relation to a disabled child, *see* § 1415(b)(1)(C). We find no federal procedural provision preempting state law on the question of fair notice of issues to be decided at the due process hearing. We turn, then, to state law.

[3] The Massachusetts Administrative Procedure Act in pertinent part provides:

> (1) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

---

establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

20 U.S.C. § 1415(a). Section 1415 is entitled "Procedural Safeguards" and contains the requirements for due process hearings under the Act. *See also* § 1415(b)(2) and (c).

Mass.Gen.Laws Ann. ch. 30A, § 11(1). The Town's claim of inadequate notice of the procedural issues is disingenuous. In a memorandum dated November 28, 1979, submitted by the Town to the state hearing officer, one section is entitled "There is no proof of procedural irregularity and no harm or prejudice to the [Does]." Additionally, uncontroverted testimony and exhibits submitted at the administrative hearing indicate that Mr. Doe met with the Town's School Committee in executive session to alert it to what he viewed as substantive and procedural irregularities in the handling of his child's special education. Adequate notice was provided to the Town on the procedural issues.

We also find that the Town had adequate notice under § 11(1) of the reimbursement issues. While the corroborating documents were not put into evidence until the last day of the hearing, testimony from Mr. Doe on the first day of the hearing (September 26, 1979) and from Mrs. Doe on the last day (November 1) was directed to whether the Town had provided them with the information regarding their right to an independent evaluation of their son, as required by 20 U.S.C. § 1415(b)(1)(A); 34 C.F.R. § 300.503; and Mass.Admin.Code tit. 603, § 328, and what independent evaluations the parents actually had obtained. We believe that the natural implication of the Does' testimony that the Town denied them notice of their right to and payment for independent evaluations is that they would expect to be reimbursed for the expenditures the law required of the Town. This inference is reasonable in view of the Massachusetts Supreme Judicial Court's decision in *Amherst-Pelham Regional School Committee v. Department of Education*, 376 Mass. 480, 381 N.E.2d 922 (1978), which validated the Department's power to order reimbursement to parents who obtained necessary services for their child because of the school committee's failure to provide them.

The hearing officer, moreover, provided an opportunity to both parties to submit rebuttal evidence as well as argument in written closing statements. At the request of both parties, the deadline was extended an additional three weeks. The Town did not utilize this evidentiary opportunity but claimed that procedural due process required that they be given an opportunity to cross-examine witnesses regarding the bills. The hearing officer found, however, and we agree, that all the submitted bills corresponded to testimony given at the hearing by witnesses examined and cross-examined by the Town. We find no authority for construing the provision "reasonable opportunity to prepare and present argument respecting the issues," Mass.Gen.Laws ch. 30A, § 11(1), to require that a *second* opportunity for cross-examination of witnesses must be provided. Nor do we construe 20 U.S.C. § 1415 to mandate such an opportunity. Rather, we think that the hearing officer provided the procedural due process required by the statute and, in any event, no prejudice has been shown. We discern no basis for a constitutional claim of denial of due process on either issue.

B. *Extent of the Hearing Officer's Consideration of Prior Years*

The hearing officer took into consideration all years of John's education because she found that the Town had provided the parents with an incomplete notice of their appeal rights in June 1977, at the close of John's first year, and no written transmission of any information about parents' rights subsequent to that time. The hearing officer therefore concluded that "the parents cannot be held responsible for any delay in requesting appeal and that the matter is legitimately before the Bureau[4]

[4]The Bureau of Special Education Appeals is a bureau within the Division of Special Education of the Department of Education of Massachusetts.

at this time." *In Re BSEA #2867* at 12 (Jan. 20, 1980). The Town challenges the consideration by the Bureau of prior years as well as the relevance of past alleged illegalities to a judgment regarding a prospective IEP. The cases on which it relies are inapposite, however. In both *New Bedford Gas and Edison Light Co. v. Board of Assessors of Dartmouth,* 368 Mass. 745, 335 N.E.2d 897, 899 (1975), and *Canron, Inc. v. Board of Assessors of Everett,* 366 Mass. 634, 322 N.E.2d 83, 85 (1975), the Supreme Judicial Court undertook to interpret Mass.Gen.Laws Ann. ch. 59, § 59, regarding the timeliness of tax abatement petitions; no rulings were made interpreting the Massachusetts Administrative Procedure Act, Mass.Gen. Laws Ann. ch. 30A, §§ 10, 11, which governed this case at the state hearings.

Moreover, the state Act, consistent with the requirements of the federal Act, expressly charges the school system with the responsibility of notifying parents of their procedural and appellate rights. *Compare* Mass.Gen.Laws Ann. ch. 71B, § 3 *with* 20 U.S.C. § 1415(b)(1)(D). *See also Scokin v. Texas,* 723 F.2d 432 (5th Cir.1984). In *Rowley,* the Court commented on the importance of the procedural safeguards in § 1415:

> When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, *see, e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley 458 U.S. at 205-6, 102 S.Ct. at 3050-1. The Court further noted that "adequate compliance with the procedures described would assure much of what Congress wished in the way of substantive content in an IEP." *Id.* Lack of notice to the parents, then, regarding their procedural rights drives a stake into the very heart of the Act.

[4] Since the Town failed to give the parents proper notice, and since such notice might have led them to appeal earlier, it was reasonable for the State to hear those appeals despite their falling outside of the specified time frame, and to view the Town's lack of notice as a waiver of any time bar objection that might otherwise apply. Here, complete procedural information should have been provided to the parents in June 1977. Although the federal Act was not yet effective on that date, the state Act's provisions were in force. The hearing officer was, therefore, empowered to take into consideration the events the parents could have appealed on that date.

The practical effect of examining the entire course of events is limited. No hearing officer or court can turn back the clock and provide a disabled child an appropriate education for prior years; prospective relief, except for reimbursement under certain circumstances, *Doe v. Brookline*, 722 F.2d at 919-21, generally comprises the remedy under the Act. *Anderson v. Thompson*, 658 F.2d 1205, 1210-13 (7th Cir.1981). The value of considering a broader period of time, therefore, is basically evidentiary, to show procedural bad faith or a history of nonimplementation of IEPs. Further, while we do not reach the question, certain prospective relief, such as compensatory education, may arguably be ordered on the basis of prior defaults in the provision of a free appropriate public education. *See Timms v. Metropolitan School District of Wabash County*, 722 F.2d 1310, 1314-15 (7th Cir.1983); *see also Milliken v. Bradley*, 433 U.S. 267, 289-90, 97 S.Ct. 2749, 2761-62, 53

L.Ed.2d 745 (1977). We conclude that interpreting the reach of the hearing officer in this manner comports with the court's responsibility to do substantial justice. *Doe v. Brookline*, 722 F.2d at 917.

C. *The Hearing Officer's Findings*

The "cooperative federalism" that has been identified as a central hallmark of the Act, *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1569 (11th Cir.1983); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 278 (3d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981); *see also King v. Smith*, 392 U.S. 309, 316, 88 S.Ct. 2128, 2133, 20 L.Ed.2d 1118 (1968); *Abrahamson v. Hershman*, 701 F.2d 223, 231 (1st Cir.1983), is specifically reflected in 20 U.S.C. § 1415(a). That section, as already noted, indicates that the procedures governing the "impartial due process hearing[s]," including the procedures due parties, are to be determined on the basis of state law unless more stringent federal provisions control. Here, in order to determine whether the state hearing officer was permitted to consider the Town's alleged violations of state special education regulations, we must decide whether the federal Act requires any differentiation in the choice of substantive law to be applied in state administrative hearings.

[5-7] Under the federal Act, a state is free to accept or reject the participation of the federal government in its educational programs for the disabled. *See Doe v. Brookline*, 722 F.2d at 916 n. 4. For states that contract for inclusion, the Act expressly authorizes and requires a state and local administrative apparatus to effectuate both its substantive and procedural guarantees in the first instance. *See, e.g.*, 20 U.S.C. §§ 1412-1415; 34 C.F.R. §§ 300.122, 300.128-.130, 300.220-.227, 300.300,

300.304. While compliance with the minimum standards set out by the federal Act is mandatory for the receipt of federal financial assistance, *Smith v. Cumberland*, 703 F.2d 4, 7 (1st Cir.1983), *cert. granted*, __ U.S. __, 104 S.Ct. 334, 78 L.Ed. 2d 304 (1983), the Act does not presume to impose nationally a uniform approach to the education of children with any given disability; it requires only that a "free appropriate . . . education," 20 U.S.C. § 1412(1), in conformity with the state's educational standards, 20 U.S.C. §§ 1401(18)[5], 1412(6)[6], be provided to each disabled child upon individualized evaluation and planning. *See* 20 U.S.C. § 1401(18)-(19) and *Rowley* 458 U.S. at 200-04, 102 S.Ct. at 3047-50. "Cooperative federalism" in this context, then, allows some substantive differentiation among the states in the determination of which educational theories, practices, and approaches will be utilized for educating disabled children with a given impairment. *Rowley* at 207-08, 102 S.Ct. at 3051-52.[7] This approach also permits sub-

[5] The pertinent language states: "The term 'free appropriate public education' means special education and related services which . . . (B) meet the standards of the State educational agency. . . ." 20 U.S.C. § 1401(18).

[6] The subsection provides:

> The State educational agency will be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State . . . will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

20 U.S.C. § 1412(6).

[7] The federal sufficiency of the state's substantive approach to educating disabled students with a given impairment is determined initially on the basis of the annual plan a state must submit to the federal Department of Education. Except for the review provided by § 1416(b), courts will generally determine the sufficiency of the state's substantive approach in regard to a named disabled child. Class actions to redress an alleged violation of the statute, however, have been authorized. *See Crawford v. Pittman*, 708 F.2d 1028 (5th Cir.1983); *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir.1983). *See also* 121 Cong.Rec. 37416 (Nov. 19, 1975).

stantive variations in the level of remedial educational services states provide, once the federal minimum standard of a "free appropriate public education" is met. *See* 20 U.S.C. § 1412(6). We find no indication in either the statutory language or the legislative history of the Act that Congress intended to create either a substantive or procedural ceiling regarding the rights of the disabled child. Thus, under our reading of the Act, states are free to elaborate procedural and substantive protections for the disabled child that are more stringent than those contained in the Act. *Accord Eberle v. The Board of Public Education of the School District of Pittsburgh, Pennsylvania*, 444 F.Supp. 41, 43 (W.D.Pa.1977).

[8] We believe that under the "cooperative federalism" approach the proper construction of § 1415 is that state substantive law supplements the federal Act in prescribing the determinations to be made at the due process hearing. It seems plain that the Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations. Congress provided for federal executive oversight through states' annual plans to assure basic compliance with the federal minimum standards but the states supply the machinery necessary to effectuate the guarantees provided by the federal Act on a daily basis.[8]

---

[8] *See, e.g.*, 20 U.S.C. §§ 1412-1415; 34 C.F.R. §§ 300.126, 300.220-227, 300.300, 300.304, 300.402, 300.501. Congressional authorization for state law to supply the interstitial detail of federal statutes and regulations is not novel. Such authorization has been granted by express declaration, *see, e.g.*, 28 U.S.C. § 1346(b) (Federal Tort Claims Act specifically makes situs state law applicable to determine the government's liability) and implicitly, as by silence, *see, e.g., Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 152, 64 S.Ct. 474, 479, 88 L.Ed. 635 (1944); *Seaboard Air Line Ry. Co. v. Kenney*, 240 U.S. 489, 493-94, 36 S.Ct. 458, 459-60, 60 L Ed. 762 (1916). *See gen-*

Given the crucial role Congress has assigned to the states in effectuating a "free appropriate public education" for all disabled children, we hold that states have the right to enforce their own laws and regulations at the due process hearings authorized by § 1415,[9] and not merely those skeletal federal provisions designed as minimum standards.[10] Any other construction would render the states powerless to effectuate the federal Act fully or to provide greater protection and services for disabled children than the Act requires. We find no support in the legislative history of a congressional intention to supplant the states' historic direction of education within their boundaries.[11]

We now evaluate the Town's claim that the hearing officer deviated from the only question properly before her and allowed extraneous considerations to taint her decision that the Town's IEP was inadequate for John's needs. The hearing officer framed the issues at the outset of her opinion:

> 1. Whether the educational plan and placement proposed by Burlington . . . a 502.4 prototype,[12] is adequate and appropriate to meet [John's] special needs.

---

erally Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 412-21 (1964); Comment, *Rules of Decision in Nondiversity Suits*, 69 Yale L.J. 1428 (1960).

[9] Those state statutes and regulations, of course, must be in compliance with the federal Act and not be invalid for some other reason, *e.g.*, as proscribed by the federal Constitution.

[10] This holding does not depart from our previous opinion in this case, which examined the role of *inconsistent* state law upon *judicial review* of a case. *See infra* at 787.

[11] Senator Stafford explained the Conference Committee bill to the Senate: "Make no mistake, educating our children is still very much a State responsibility, and this bill does not change that . . . ," 121 Cong.Rec. 37411 (Nov. 19, 1975). *See also Rowley*, 458 U.S. at 208, 102 S.Ct. at 3052.

[12] Massachusetts designates as "prototypes" its seven basic formats for special education. These range along a continuum from least restrictive, Mass.Admin. Code tit. 603, § 502.1 ("Regular education program with modifications") to § 502.4 ("substantially separate program") to § 502.7 (home and hospital programs). *See generally id.* § 500.0-508.4.

2. Whether the Burlington Public Schools have violated the procedural requirements of Chapter 766 in significant and prejudicial ways.
3. Whether, in the alternative, the Carroll School, a 766 approved private day school is the least restrictive, adequate program and placement which meets [John's] special educational needs.
4. Whether Burlington Public Schools is responsible for payment of certain evaluations.

The Town does not object to issue one, nor to the correlative inquiry contained in issue three; it concentrates its attack on issue two.[13] The hearing officer's inquiry, however, is mandated by the crucial role of state regulations in effectuating the guarantees of the federal Act. Further, the officer did not merely enumerate the state and federal regulations she found the Town to have violated, but discussed how many of those illegalities seriously compromised John's right to an appropriate education.

[9] Since there is no claim of federal preemption here, the only question remaining is whether the hearing officer properly applied state substantive law. In *Isgur* v. *School Committee of Newton*, 9 Mass.App. 290, 400 N.E.2d 1292 at 1292 (1980), the court posed the pertinent question: "[D]oes the failure to comply with the regulation[s] identified go to the essence of rights granted by c. 766 [and the federal Act]?"[14] We have no

[13] The Town also objected to issue four on the basis of lack of notice but we have found no merit in that objection. *See supra* at 780-781.

[14] The *Isgur* court posed a second inquiry for state reviewing courts, but not hearing officers, if the "essence of rights" question is answered affirmatively. It required plaintiffs also to prove that "their substantial rights have been prejudiced" by the decision of the BSEA. 400 N.E.2d at 1297. However prudent this additional inquiry may be, which we, of course, do not presume to

difficulty in finding that the hearing officer properly answered this question affirmatively. Accordingly, we hold that the hearing officer did not err in linking the Town's violations of John's essential rights to the conclusion that the Town lacked the capacity to implement the IEP as written.

II. THE SCOPE OF THE DISTRICT COURT'S REVIEW

[10] The parties present several questions regarding the scope of the district court's review of the state administrative proceedings. The Act provides in pertinent part:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2). The district court's review raises the following issues: the proper interplay between the federal and state Acts; the weight to be accorded the administrative record and the deference due the administrative findings; the construction and application of the "additional evidence" provision;

---

decide, that inquiry is authorized by the state statute only where a *state agency* is alleged to have engaged in unlawful procedures that affected its decision. *See* Mass.Gen.Laws Ann. ch. 30A, § 14(7)(d). The Town is not an agency within the meaning of this statute, *see* Mass.Gen.Laws Ann. ch. 30A, § 1(2) (agency is a division of state government); *Saxon Coffee Shop, Inc. v. Boston Licensing Board*, 380 Mass. 919, 407 N.E.2d 311 (1980), and therefore this second inquiry appears to be unauthorized in the instant case. *Compare Isgur with Amherst-Pelham*, 376 Mass. 480, 381 N.E.2d 922, 937 (1978) (alleging invalidity of state BSEA decision because Bureau's decision not issued within period required by its own regulations; Supreme Judicial Court requires demonstration that delay harmed school committee's substantial rights).

and the omission of a diagnostic determination. Our resolution of these issues follows the spirit of "cooperative federalism." We must strive for an interpretation of the federal Act that does not limit the states to the federal floor, but allows them to achieve greater aspirations by higher commitments.

A. *Procedural Violations*

We first turn our attention to the district court's treatment of the state administrative finding that the Town violated numerous statutory and regulatory provisions governing procedures in special education, some federal and some state. The hearing officer found that the Town had violated, *inter alia*: the extensive regulations of both bodies of law regarding parental notification and written consent to evaluations which are, or may be, used to determine classroom placement and program; both federal and state regulations regarding the writing of an educational plan in 1977; the state regulation requiring that an evaluation team issue an educational plan or a finding of no special needs at the conclusion of an evaluation; regulations requiring that all members of an evaluation team meet together to discuss the child's educational needs, rather than in smaller groups seriatim; and the regulations mandating parental notification prior to modifications of an IEP already in force.

The district court did not take these findings into consideration. Instead, the court framed the procedural question before it as "whether the state had complied with the procedures set forth in the Act." *Town of Burlington v. Department of Education and Doe*, Memorandum of Decision at 9 (August 13, 1982). That issue, in the district court's view, required it not only to "'satisfy itself that the State has adopted the State plan, policies, and assurances required by the Act,' but also [to] determine that the State has created an IEP for the child in

question which conforms with the requirements of § 1401(19)." *Id.* (quoting *Rowley*). The district court then found that "Massachusetts has conformed with all of the Act's procedural requirements"[15] and that the "parents have been afforded the right to complain" and appeal.

[11] We believe that the district court framed the procedural inquiry too narrowly by looking only to the State's procedural compliance. Here, the Town, not the State, was alleged to have violated the Does' procedural rights. Both federal and state regulations extensively govern the responsibilities of towns or local educational agencies (LEAs) under the Act, as well as those of States. *See, e.g.*, 34 C.F.R. §§ 300.180-300.240; 300.452; 300.530-.534; Mass.Admin.Code tit. 603, §§ 200.0-211.0; 300.0-328.4. The federal statute itself places obligations upon the LEAs and designates the states as the enforcers of compliance with the federal laws. *See* 20 U.S.C. §§ 1412(6); 1414(a)(5)-(7). *See also* Senate Committee on Labor and Public Welfare Report No. 94-168, 1975 U.S.Code Cong. & Ad.News 1425, 1448 (Act designed to "assure a single line of responsibility with regard to the education of handicapped children"). The Supreme Court in *Rowley* emphasized the crucial significance of the procedural protections and enumerated some of the very provisions the state hearing officer held the Town to have violated. *See Rowley* 458 U.S. at 205, 102 S.Ct. at 3050. Finally, under the federal statute, the complaint may concern "any matter relating to the identification, evaluation, or educational placement of the child, or

---

[15] This may not be entirely accurate. From our review of the federal and state Acts it appears that Massachusetts does not require its local educational agencies to follow the special procedures for evaluating specific learning disabilities the federal Act requires. *Compare* 34 C.F.R. §§ 300.540-.543 *with* Mass.Admin.Code tit. 603, §§ 300.0-339.4. *See also* Pub.L. 94-142, § 5(6), *reprinted at* 20 U.S.C. § 1411 (Note).

the provision of a free appropriate public education of such child." § 1415(b)(1)(E). This language obviously includes complaints about Town or LEA procedural violations of the Act and not merely those of the states. We, therefore, believe that the Court's directive to determine whether the "State complied with the procedures set forth in the Act," *Rowley* at 206, 102 S.Ct. at 3051, should be interpreted to open inquiry into the procedural compliance of the Town, LEA, or other agency supervised by the State where noncompliance is alleged. The district court should have expanded its review to include the Town's procedural violations.

This conclusion raises the question whether the Town can be held accountable in district court only for violations of federal law or for violations of state regulations as well. In *Burlington I*, we held that it was error for the district court to grant summary judgment on the basis of state law because "the federal specification for review, when invoked, seems to us to occupy the field over an inconsistent state provision." 655 F.2d at 431 (footnote omitted). That case dealt with the judicial review provision in section 1415(e)(2) which establishes jurisdiction over disputes in both the federal and state courts, and provides for review under a rigorous preponderance of the evidence standard. We concluded that the inconsistent state review provision, which requires a deferential "substantial evidence" standard, is inconsistent with the federal standard and therefore does not apply in suits under the federal Act. Although state law cannot provide a separate basis for relief via a pendent state claim, it would be wrong to interpret our earlier decision as holding that state law is irrelevant to resolving the federal question before the court. Because of the cooperative federalism approach and the provisions for states to supply the interstitial detail so essential for effectuating the Act, it is hardly appropriate for federal courts to enforce only the skeletal federal framework; this would greatly undermine

the provisions for substantive and procedural protection to the beneficiaries of the Act.

[12, 13] The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time. As noted, this inquiry has both procedural and substantive components. *Rowley* at 206-07, 102 S.Ct. at 3051. We do not think the question can be answered properly unless the district court takes into consideration the federal minimum requirements and consistent state interstitial regulations. While a separate state claim for violation of state regulations will not lie, they are material and relevant to the determination of whether the federal right to a free appropriate public education has been provided under the IEP.

B. *State Substantive Standards*

The next question is whether state substantive standards which guarantee a higher level of educational quality and benefits for disabled children than the federal minimum will be given effect in federal courts. The *Rowley* Court, in interpreting the federal Act, found it "generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunities provided other children.'" *Rowley* at 198, 102 S.Ct. at 3046. But the Court also held the Act to contain a federal minimum standard, a "basic floor," of beneficial education. *Rowley* at 201, 102 S.Ct. at 3048.[16] While the Court did not articulate "one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," *Rowley* at 202, 102 S.Ct. at 3049, it did identify some basic guidelines.

---

[16] *See generally* Note, Handicapped Children Are Entitled to a Beneficial Education: *Board of Education v. Rowley*, 69 Iowa L.Rev. 279 (1983).

It construed the federal standard to require, *inter alia,* personalized instruction based on a determination of the unique needs of the disabled child with sufficient support services to permit the child to benefit educationally from that instruction. It also found that the plan must be "reasonably calculated to enable the [specific] child to receive educational benefits," *id.* at 207, 102 S.Ct. at 3051. It seems clear that § 1401(16), which states " 'special education' means specially designed instruction . . . to meet the unique needs of a handicapped child," and § 1401 (18), which specifies the formal requirements of a "free appropriate public education," require that all of a child's special needs must be addressed in the educational plan. The objective of the federal floor, then, is the achievement of effective results—demonstrable improvement in the educational and personal skills identified as special needs—as a consequence of implementing the proposed IEP. *See* 20 U.S.C. § 1401(19)(E). *Cf. Helms v. McDaniel,* 657 F.2d 800, 802 (5th Cir.1981); *Kruelle v. New Castle County Schools,* 642 F.2d 687, 691 (3d Cir.1981).

[14, 15] While the federal Act establishes a basic floor of education, it may provide a lesser standard of educational services and procedural protection than state law mandates.[17] *See, e.g., Cothern v. Mallory,* 565 F.Supp. 701, 706-08 (W.D. Mo.1983) (state statute requires special education to "meet the needs and maximize the capabilities" of the disabled child); *Isgur v. School Committee of Newton,* 9 Mass.App. 290, 400 N.E.2d at 1298 (state statute directs reassignment if, after subsequent evaluation, "another program may benefit the child more," and if "program does not benefit child to the maximum extent feasible"). The federal Act also specifies that a federal

---

[17] Massachusetts has a highly developed special education law which predated the federal Act and has served as a model for other state statutes.

"free appropriate public education" must "meet the standards of the State educational agency," 20 U.S.C. § 1401(18)(B); *see also Rowley* 458 U.S. at 203, 102 S.Ct. at 3049. We hold, therefore, that the Act incorporates by reference state standards, be they substantive or procedural, that exceed the federal basic floor of meaningful, beneficial educational opportunity.[18] Thus a district court's inquiry must include a determination whether the state substantive standard exceeds the protection and services required by the federal Act. If it does, the state standard will operate to determine what an appropriate education requires for a particular child in a given state.[19]

Here, the district court disposed of the hearing officer's decision summarily:

> The hearing officer's decision was greatly influenced by her finding that the Town had failed to comply with "educational and procedural mandates" and her further finding of "substantive and continuing procedural irregularity." These violations of state regulations, even if they were substantial, cannot, however, affect the determination under federal law of what the "appropriate" placement was.

---

[18] *See Rowley* at 192, 201, 102 S.Ct. at 3043, 3048.

[19] A state standard, however, which provides a substantive level of benefits exceeding the federal floor of opportunity may not be applied such that the federal right to an education in the least restrictive environment will be diminished. Just as the least restrictive environment guarantee, 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. § 300.550-.554, cannot be applied to cure an otherwise inappropriate placement, *Kruelle v. New Castle County Schools*, 642 F.2d 687, 695 (3d Cir.1981), similarly, a state standard cannot be invoked to release an educational agency from compliance with the mainstreaming provisions. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, __ U.S. __, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983). *See also Norris v. Massachusetts Department of Education*, 529 F.Supp. 759, 767 (D. Mass.1981) (mainstreaming requirement must be construed and applied without derogating from the substantive level of education required by the Act).

This ruling ignores the requirement of § 1401(18), which specifies that a disabled child's education must "meet the standards of the State educational agency."

Application of the *Rowley* principles reveals two additional problems with the district court's decision. First, the hearing officer provided considerably more content to John's "unique needs" than the district court acknowledged in its opinion. She found that John did not work well independently, was painfully aware of his learning deficits, and had lost self-esteem because his reading skills had not allowed him to keep pace with his peers. In the Town's proposed placement, John's reading skills would have been lower than those of five of the six students and he would have been one of the older students in the class. The hearing officer was concerned that insufficient group work was possible in the class for John's needs, and that "the skill variance among students might have the effect of increasing [John's] frustration. I am additionally concerned that a highly individualized program may not be appropriate for a student who does not work well independently." In its opinion, the district court did not discuss these findings at all. Instead, the court appears to have taken as its point of reference a learning disabled child *generally* and how the Town's placement would provide a beneficial education.

[16] Nor did the district court address the hearing officer's findings that the Town exceeded the maximum thirty-six months chronological age span in the classroom proposed for John and failed to request a waiver from the department for this deficiency, and that the proposed school day was shortened by fifteen to twenty minutes without state approval. In reviewing the administrative decision, the court simply concluded that the proposed IEP complied with the "definitional checklist" of an appropriate education and met the state's educational standards. The court, in effect, ignored the state's substantive standards. This was error.

C. *The Evidentiary Issues*

Defendants contend that the district court erroneously interpreted and applied the Act's provision for "additional evidence." They also question the weight the court gave the administrative record and the deference accorded the administrative findings. Because we consider these questions interrelated, we discuss them together.

The only statutory language directly addressed to these evidentiary matters directs that "the court shall *receive the records of the administrative proceedings, shall hear additional evidence at the request of a party,* and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2) (emphasis added). This court has described the judicial review proceedings under the Act as "something short of a trial *de novo*." *Colin K. By John K. v. Schmidt,* 715 F.2d 1, 5 (1st Cir. 1983). The district court, however, which did not have the benefit either of the Supreme Court's decision in *Rowley* or of ours in *Colin K.* prior to trial, joined other courts in interpreting the Act to require a trial *de novo.* Pretrial Order at 6 (March 18, 1982). Consonant with this, it ruled that it was "bound to receive additional evidence offered by the parties, provided it is relevant." *Id.*

[17] We believe that the key to the review authorized by the Act lies in the additional evidence clause. We construe "additional" in the ordinary sense of the word, *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1980), to mean supplemental.[20] Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely

[20] We have found no legislative history to guide us on the construction to be given "additional evidence."

inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires. *Rowley* 458 U.S. at 206, 102 S.Ct. at 3051.

[18] A trial court must make an independent ruling[21] based on the preponderance of the evidence, but the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial. The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

We decline to adopt the rule urged by defendants that the appropriate construction is to disallow testimony from all who did, or could have, testified before the administrative hearing. We believe that, although an appropriate limit in many cases, a rigid rule to this effect would unduly limit a court's discretion and constrict its ability to form the independent judgment Congress expressly directed. A salient effect of defendants' proposed rule would be to limit expert testimony to the administrative hearing. Our review of the cases involving the Act reveals that in many instances the district court found expert testimony helpful in illuminating the nature of the controversy and relied on it in its decisional process.[22] There could be some

---

[21] *See* S.Conf.Rep. No. 94-455 at 50, *reprinted in* U.S.Code Cong. & Ad.News 1975 at 1503; *Rowley* at 205, 102 S.Ct. at 3051.

[22] *See Colin K. by John K. v. Schmidt*, 536 F.Supp. 1375, 1380 (D.R.I.1982), *aff'd*, 715 F.2d 1 (1st Cir.1983); *Campbell v. Talladega City Board of Education*, 518 F.Supp. 47, 55-56 (N.D.Ala.1981); *Georgia Association of Retarded*

valid reasons for not presenting some or all expert testimony before the state agency. Experts are expensive—the parties at the state level may feel that their cases can be adequately made with less backup, especially since the administrative hearing in Massachusetts is conducted by an expert. We also recognize that in many instances experts who have testified at the administrative hearing will be bringing the court up to date on the child's progress from the time of the hearing to the trial. It would be difficult to draw a sharp line between what had or could have been testified to at the administrative hearing and the trial testimony.

[19, 20] The determination of what is "additional" evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*. A practicable approach, we believe, is that an administrative hearing witness is rebuttably presumed to be foreclosed from testifying at trial. A motion may then be made to allow such a witness to testify within specified limits stating the justification for the testimony. In ruling on motions for witnesses to testify, a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources. The court should look with a critical eye on a claim, such as made here, that the credibility of a witness is a central

---

Citizens v. McDaniel, 511 F.Supp. 1263, 1266-73 (N.D.Ga.1981), *aff'd*, 716 F.2d 1565 (11th Cir.1983); *Armstrong v. Kline*, 476 F.Supp. 583, 590-600 (E.D.Pa.1979), *aff'd sub nom., Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed. 2d 981 (1981); *see also Abrahamson v. Hershman*, 701 F.2d 223, 226 (1st Cir. 1983); *Roncker v. Walker*, 700 F.2d 1058, 1061 (6th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983).

issue. The claim of credibility should not be an "open sesame" for additional evidence. Such an approach followed by a pre-trial order that identifies who may testify and limits the scope of the testimony will enable the court to avoid a trial *de novo*.

A further question remains: whether any special deference is to be accorded the administrative findings. The statute requires the reviewing court to "*receive the records* of the administrative proceedings," § 1415(e)(2) (emphasis added), and *Rowley* mandates that "due weight" shall be accorded to the "proceedings." No direct reference, in either the Act or *Rowley*, is made to the administrative findings. The district court's initial solution was to accord them the "*prima facie* effect of a Master's findings." The applicable rule, Fed.R.Civ.P. 53(e)(2), states: "In an action to be tried without a jury, the court shall accept the Master's findings of fact unless clearly erroneous." In view of the Act's requirement of the preponderance of the evidence standard of review, applying the clearly erroneous test to administrative findings would be contradictory and confusing. If the district court meant to place its emphasis on the *prima facie* effect to be given such findings, the result would be a plethora of motions to submit additional evidence in an attempt to overcome the *prima facie* effect of the findings and a trial *de novo* would seem inevitable. *Cf. Helms v. McDaniel*, 657 F.2d 800, 805 (5th Cir.1981) (administrative findings cannot be treated as master's findings).

[21] Because Congress intended courts to make bounded, independent decisions—bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court—the question of the weight due the administrative findings of facts must be left to the discretion of the trial court. The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence,

does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

[22, 23] There is a corollary to this rule. Where a state administrative decision rules a proposed IEP invalid because it has not met the state's substantive or procedural requirements pertaining to a free appropriate public education for a particular disabled child, a federal court should accord the findings deference. In such a situation, as here, a federal court continues to have the power of review on both federal and state grounds but should be more circumspect about its intrusion. It is hard to locate a significant federal interest in displacing a state agency's supportable ruling[23] that one of its school systems has not complied with state standards. In turn, where a state agency holds an IEP to have met state standards, the federal court has a continuing obligation to ensure that the state standards themselves and as applied are not below the federal minimums. This important obligation persists despite any state administrative rulings on federal law or on state recodifications of federal law.

This asymmetrical approach is based upon the principles and policy of federalism which ground the Act, and more specifically, on the pivotal role of the state—historically and as expressly recognized in the Act—in setting and enforcing the educational standards for its citizens. The local education agencies are subject to the state's legal authority, both as a general matter and per the operation of the federal Act. *See*

---

[23] We do not suggest that a federal court should uphold a state agency's ruling that is contrary to established state law.

20 U.S.C. § 1431(a)(2); *see also* 20 U.S.C. § 1412(6). As already discussed, a federal minimum floor of beneficial education is provided in the Act but a state is free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children. The local educational agencies are then required to meet the state-mandated level of protection in the IEPs they propose and implement. We may conclude, then, that school systems have a set of affirmative obligations that are to be discharged under the scrutiny of state educational agencies, and only as a last resort, the federal and state courts.

This approach to IEP appeals from state educational agencies will augment states' abilities to enforce their substantive and procedural requirements regarding protection for disabled children where they exceed the federal minimum floor, and to require of local educational agencies full performance of state interstitial regulations.[24] The achievement of the federal Act's goal—free appropriate public education for disabled children—will occur primarily via state efforts. We believe this approach properly locates the federal interest at stake and limits federal intrusion into the relations between states and their political subdivisions.

[24] In this case, the district court did not follow its initial intention of giving the findings prima facie effect; nor did it give them careful consideration. It ruled the numerous findings of the state hearing officer regarding procedural and substantive violations of state law to be "irrelevant." Under the approach we have outlined, these findings by the state hearing officer must be reviewed as bearing on the federal right to an appropriate education and must receive the court's specific consid-

[24] We do not believe the Act envisions federal courts releasing school systems from their state-mandated responsibilities and allowing them to comply only with the federal minimums, as the Town argues.

eration. Further, because the hearing officer found the Town's proposed IEP invalid as a matter of state law, the district court should have circumscribed its review and accorded the state findings deference.

A final evidentiary issue remains. The Does assert as error the district court's omission of a diagnostic determination of John's disability. In its Memorandum of Decision, the district court stated: "Because the experts are in substantial agreement as to the manner in which [John] should be helped, I need not resolve the differences in their diagnoses, if indeed they are anything other than differences in emphasis." The Town endorses the district court's position. We cannot agree. The Congress indicated its concern regarding the misclassification of disabled children and ordered the establishment of special evaluation procedures. *See* 20 U.S.C. § 1412(5)(C); 34 C.F.R. §§ 300.530-.534. Even more exacting procedures were required for the evaluation of children suspected of having specific learning disabilities. *See* 20 U.S.C. § 1411 (Note); 34 C.F.R. §§ 300.540-.543.

We do not read the experts' testimony and reports as being in substantial agreement. They and other witnesses sharply disagreed over the nature of John's learning difficulties. One expert identified a severe neurologically based visual processing problem, often known as dyslexia, as the basis of John's learning problems, and noted a secondary attention deficit disorder. Another expert expressly and repeatedly excluded dyslexia as the source of John's problems and gave a diagnosis of both hyperactivity and attention deficit disorder. We recognize that the medical and educational definitions of dyslexia are in flux and that the term is being replaced in favor of more precise diagnostic terminology. *See* J. Lerner, *Learning Disabilities* 295 (1981). We also are aware that hyperactivity and specific learning disabilities flowing from visual processing problems may be present concurrently but have no necessary

conjunction. *See* S. Smith, *No Easy Answers: Teaching the Learning Disabled Child* 20 (1979). Because adequate educational remediation is dependent upon the analysis of the nature of the learning difficulties, the district court should make a finding regarding these divergent assessments of John's problems. *Cf. Colin K. v. Schmidt,* 536 F.Supp. 1375, 1387 (D. R.I.1982), *aff'd,* 715 F.2d 1 (1st Cir.1983) (district court enters a finding regarding diagnostic conflict between school system and plaintiffs).

III. SUCCEEDING YEARS—JURISDICTION AND PROOF

[25] In a pretrial order, the district court ruled that under its authority to grant appropriate relief, 20 U.S.C. § 1415(e)(2), it would hear evidence and rule upon the appropriate educational placement for the years 1980-81 and 1981-82 for which there was no IEP and therefore no state agency decision. Subsequently, *Rowley* rejected a school system's claim that a court review proceeding is moot when the challenged IEP has lapsed and IEPs for subsequent years have not been devleoped. The Court stated:

> Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review.

Rowley 458 U.S. at 186-87 n. 9, 102 S.Ct. at 3040-41 n. 9 (citations omitted). Thus *Rowley* makes it clear that the status of the 1979-80 IEP is not now moot, and the court may proceed

to adjudicate its correctness and the question of who must bear the ultimate expense of John's placement in 1979-80.

It is much more difficult to determine the court's powers with respect to allocating the cost of John's schooling in 1980-81, 1981-82 and any subsequent years up to the date of the court's final decree.[25] The Town did not prepare IEPs for these years, and no appeal was lodged with the state agency. Accordingly, there were no reviewable "findings and decision," 20 U.S.C. § 1415(e)(2), before the district court for those years.

With inexplicit statutory guidance, the district court ruled that for the year 1979-80, the Town had the burden of proving by a preponderance of the evidence that the plan it formulated was appropriate for John and that the defendants Doe had the burden of proving the appropriateness of the relief they sought for years after 1979-80.[26] This allocation of the burden of proof is questioned on appeal.

[26, 27] Section 1415(e)(2) contains no provision which specifically assigns the burden of proof to a particular party in the appeal of an agency decision. As a general principle, however, in such appeals the burden of proof is on the party who seeks to overturn the findings and decision of the agency. *Mazaleski v. Treusdell*, 562 F.2d 701, 717 n. 38 (D.C.Cir. 1977). *But see Grymes v. Madden*, 672 F.2d 321, 322 (3d Cir. 1982) (EAHCA appeal). This allocation of proof is justified because it structurally assists courts in according the administrative agency's expertise the respect it is owed, an approach *Rowley* implicitly encourages. Here, the state agency ruled the Town's IEP was inadequate only for 1979-80; it made no find-

---

[25] Prospective relief is not an issue in this case.

[26] In its Memorandum of Decision following the trial, the district court phrased the parents' burden somewhat differently: the parents must prove that for subsequent years the Pine Glen placement "would have been inappropriate" and held that this burden was not met.

ings or decision regarding the appropriateness of the IEP for subsequent years. Thus, neither party can be assigned the burden for later years on the basis of its posture on an appeal from a state agency decision.

The Town claims that it attempted to discharge its responsibilities for a ten-month review, Mass.Admin.Code tit. 603, § 330, but that the Does refused to make John available. It submits that such a review might have convinced the Town special education administrators that they were in error and that the Carroll School was the appropriate placement. By implication, the Town suggests that it then could have prepared revised IEPs, which it would prove appropriate in district court.

[28] The federal Act omits any reference to whether IEPs are to be revised during the pendency of review. We, therefore, must fashion a rule to facilitate implementation of the Act. We think that pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law, at least in the absence of a stipulation between the parties providing for how the outcome of the suit will affect later years. Without an IEP as a starting point, the court is faced with a mere hypothesis of what the Town would have proposed and effectuated during the subsequent years, an hypothesis which at the time of trial would have the unfair benefit of hindsight. Such a rear view proposal could not comply with the statutory requirements for drafting IEPs, could not have been submitted in a timely fashion to the parents, and cannot constitute evidence at trial. IEPs for subsequent years could be appealed to the state agency; and appeals from the state agency's "findings and decisions" on the subsequent IEPs could be consolidated with the original appeal to the district court. The continuation of the IEP process during the pendency of litigation may assist in promoting settlements. Also, subsequent IEPs that have not been appealed

to the state agency may still provide useful evidence for the district court in fashioning "appropriate" relief, *see infra*.

[29] Here, despite the Town's claim that it attempted to review and revise John's IEP in accord with his progress at the Carroll School, it failed to comply with the legal requirements for triggering such a review. The Town had the responsibility of providing the parents with appropriate notice of its intention to review John's educational placement under the provisions of 34 C.F.R. § 300.504, of scheduling and conducting the review meeting per 34 C.F.R. § 300.343 and Mass. Adm.Code tit. 603, §§ 330.0-333.3, and of determining at that meeting whether a reevaluation of John himself was desirable. The Town mistakes, therefore, the difference between the mandatory review of the child's IEP and progress, *id.* § 333.0, and the permissive reevaluation of the *child*, *id.* §§ 333.2(d) and 333.3. These are separate responsibilities. In the ten-month review, the parents and, where appropriate, the child, may attend and particcipate in the IEP review meeting. When a reevaluation of the *child* is sought, the regulation expressly states that parental consent must be obtained prior to reevaluation. *Id.* The regulations plainly prescribe that IEP review shall occur regardless of whether parents participate or whether a reevaluation of the child occurs. The Town's IEP responsibilities were therefore not excused by the parents' refusal to make John available,[27] and accordingly no advantage should accrue to the Town by dint of its failure to prepare IEPs during the subsequent years of this litigation.

[30] Despite the absence of any reviewable "findings and decision" by the state agency for subsequent years, the district

[27] This is not to say that during litigation an evaluation of the child cannot be had pursuant to Fed.R.Civ.P. 35. The record does not show that any such discovery motion was made.

court has authority with respect to those years under its power to grant appropriate relief incident to its determination concerning the contested IEP for the initial year, 1979-80. If on remand the district court finds in accordance with the BSEA holding that the Town's 1979-80 IEP was improper and that the Carroll School was then the correct placement, we believe it could order the Town also to pay for John's attendance at the Carroll School in 1980-81 and in later years up through the end of the school year in which the court's ruling is made—unless the court finds that other factual ccirccumstances not now apparent warrant a different result. In the alternative, if the district court should again uphold the Town's 1979-80 IEP, then the district court could order the Town to cease paying for the Carroll School at an appropriate time.[28]

When the district court turns to formulating appropriate relief for the subsequent years, the losing party in the dispute over the 1979-80 IEP will have the burden of producing evidence and persuading the court of changed circumstances that render the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years.[29] The court will hear evidence regarding the subsequent years' appropriate placement from both parties prior to ordering "appropriate" relief, per § 1415(e)(2).

IV. Reimbursement

Since it is obvious that there must be a remand, it is necessary to discuss reimbursement. The factual background is essential

[28] We deal with the question of whether reimbursement would be appropriate relief in the present case, *infra*, Part IV.

[29] This allocation of burdens will not govern cases in which subsequent IEPs have been reviewed by the state agency. If a state agency reviews a subsequent IEP then, in accordance with our holding, *supra*, the party seeking to overturn that decision would bear the burden of proof.

because the claim of estoppel from reimbursement has been made by all parties.[30] In the spring of 1979, per his IEP, John was attending a regular third grade class at the Town's Memorial School, supplemented by special reading assistance of one hour daily in the school's resource room. At the IEP review meeting in May, the parents learned that John's reading skills had regressed over the year, that he was showing little progress in school generally, and that his self-esteem had plummeted. On the basis of these negative reports, the Town and parents agreed that John's educational placement at Memorial School was not beneficial and might be detrimental; the only disagreement was over the placement to which John should be moved. The Town proposed to transfer him to another school, Pine Glen, and assign him to a self-contained classroom for children with special needs; it was not a class solely or chiefly comprised on learning disabled students. On the basis of expert opinion from specialists at Massachusetts General Hospital who had evaluated John's learning and perceptual difficulties, the parents rejected the Town's proposed placement and IEP. After invoking the administrative appeals process in July, they enrolled John in the Carroll School in August. This private school, which specializes in teaching the seriously learning disabled, enrolls new students only in the fall of each school year.

The state due process hearing was held during the fall and the BSEA decision issued in late January 1980. The hearing officer determined that the Town's Pine Glen proposal was inappropriate for John and the Carroll School was the correct placement. The hearing officer ordered the Town to reimburse the Does, *inter alia*, "for costs related to the [Carroll] placement dating from the [parents'] rejection" of the Town's proposed IEP and pay for the expenses of the placement for the 1979-80 school year.

---

[30] The State here, as in the other issues, supports the Does.

The Town filed an appeal in the district court on February 26, 1980, and thereafter requested a stay of the BSEA order. As of December 15, 1980, the Town had not paid any money for John's tuition or transportation expenses and the parents protested that they could no longer afford to maintain John at the Carroll School. On February 9, 1981, at a hearing in the district court, the Town agreed to pay for John's education for 1980-81 and prospectively, but refused to reimburse the Does for expenses related to the 1979-80 academic year. The district court ordered the Town to repay the Does for their outlay. This court vacated the district court's interim reimbursement order and held that interim relief could be granted only on a showing of irreparable harm, which was not made. *Burlington I*, 655 F.2d 433-34. This preliminary injunction approach was reaffirmed in *Doe v. Brookline*, 722 F.2d at 916-17.

In evaluating the parties' competing claims, we recognize four significant sets of events: first, the Does' rejection of the IEP, their initiation of the state administrative appeals process, and their placement of the child in a private school; second, the hearing officer's decision finding the Town's IEP inadequate and inappropriate; third, the commencement of the district court's jurisdiction via the Town's filing of its complaint; and fourth, the yet-to-come final decision in the case.

A. *The Parents' Transfer of John to the Carroll School*

The Town argues that we should affirm the district court's ruling in its favor on the basis of the parents' conduct in September 1979. Specifically, it urges that because John's parents enrolled him in the private Carroll School prior to the conclusion of the state administrative proceedings, they violated § 1415(e)(3), and are therefore barred from any reimbursement relief. That section provides in pertinent part:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, . . . until all such proceedings have been completed.

20 U.S.C. § 1415(e)(3). In support of its position, the Town cites two Fourth Circuit cases, *Rowe v. Henry County School Board*, 718 F.2d 115 (4th Cir.1983); *Stemple v. Board of Education*, 623 F.2d 893 (4th Cir.1980), *cert. denied*, 450 U.S. 911, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981), and one Eighth Circuit case, *Monahan v. Nebraska*, 645 F.2d 592, 598 (8th Cir.1980).[31] The State and Does argue that the child had no current educational placement and that the State and parents had "otherwise agree[d]."

We have already departed from *Stemple* and joined the Seventh Circuit in ruling that § 1415(e)(3) "establishes a strong preference, but not a statutory duty, for maintenance of the status quo." *Doe v. Brookline*, 722 F.2d at 918. We expressly reserved opinion on whether parental "self-help" constitutes a bar to a reimbursement remedy at final judgment. That question is now squarely before us, and we respectfully decline to follow the Fourth Circuit.

The rule the Fourth Circuit adumbrated in *Stemple* and *Rowe* was an interpretation of § 1415(e)(3) in opinions which did not rely on either the Act's legislative history or the structure and purposes of the Act as a whole. In *Stemple*, the court held that a statutory duty for the parents not to alter the child's educational placement arose "as soon as school authorities make identification, evaluation, and placement of a handicapped child and continues until a decision not to contest it is

---

[31] This also appears to be the Ninth Circuit rule. *See Mt. View-Los Altos United High School District v. Sharron B.H.*, 709 F.2d 28 (9th Cir.1983).

reached or, if a contest ensues, until that contest is finally determined." 623 F.2d at 898. In *Brookline* we quoted the only legislative history directed to (e)(3), wherein a Conference Committee Senator explained that the Committee felt that "a placement or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach." 121 Cong.Rec. 37412 (Nov. 19, 1975). Accordingly, we concluded

> [w]e do not believe that Congress intended to freeze an arguably inappropriate program for the three to five years of review proceedings. To construe (e)(3) in this manner would thwart the express central goal of the Act: provision of a free *appropriate* education to disabled children. § 1412(1) (emphasis added).

Brookline at 918.

A number of cases have indicated Congress' prescience regarding the need for flexibility in applying the Act. Sometimes cases are brought because the parents expect too much from the school system, and the parents deem even extraordinary efforts on the part of the system insufficient for the child. *See, e.g., Rettig v. Kent City School District,* 539 F.Supp. 768 (N.D.Ohio1981), *aff'd in pertinent part, vacated in part,* 720 F.2d 463 (6th Cir.1983). By all reports, the child is in an appropriate, and indeed, an excellent placement, and there is no reason for the child to be moved during the pendency of review, or even after review. At the other extreme, as we observed in *Brookline,* there are cases in which the school system is plainly not handling the child's special education in an appropriate manner. These cases might involve a school system which refuses to complete the diagnostic and placement process authorized by the Act, *see, e.g., Quackenbush v. John-*

son City School District, 716 F.2d 141 (2d Cir.1983), *cert. denied*, __ U.S. __, 104 S.Ct. 1426, 79 L.Ed.2d 750 (1984); *Williams v. Overture*, No. 83-C-897-S (W.D.Wisc. Feb. 24, 1984); *Blazejewski v. Board of Education of Allegany*, 560 F.Supp. 701 (W.D.N.Y. 1983), or which declines to provide an appropriate private placement where a public placement is plainly lacking, *see, e.g., Parks v. Pavkovic*, 536 F.Supp. 296 (N.D.Ill.1982). In *Brookline*, we implicitly recognized in these circumstances the validity of parents making a unilateral move to fund private educational services pending review and of the parents' right to receive reimbursement at final judgment if they are held to have acted appropriately. *See Brookline* at 916; *cf. Blomstrom v. Massachusetts Department of Education*, 532 F.Supp. at 713-14 (parents to be reimbursed only for the appropriate educational services they enlisted after rejection of an inadequate IEP).

[31] We believe this approach is authorized by the Act. The Congress repeatedly enunciated as its primary goal a "free appropriate public education" for disabled children, *see, e.g.*, 20 U.S.C. §§ 1412(1), 1412(2)(B), 1415(a), 1415(b)(1)(A). We have found that § 1415(e)(3) is directory rather than mandatory, *see Brookline* at 918, and thus where there is an irreconcilable conflict between achieving the Act's primary goal and maintaining the "current educational placement," the "appropriate education" goal must prevail. We believe the Fourth Circuit's rule exalts form over substance because parents are barred from reimbursement if they change the child's placement at all prior to the termination of all proceedings, regardless of whether they rely on expert advice or a state agency decision in their favor, and even though the school system is held not to have proposed an appropriate education for the child. In *Rowe v. Henry County School Board*, No. 80-0149(D), slip op. (W.D.Va. July 15, 1982), *aff'd in pertinent part, vacated*

in part, 718 F.2d 115, the school system had not proposed an Individualized Educational Program for a child with severe learning disabilities and offered only vague generalizations regarding the education of disabled children. The district court found that the school system had "wholly failed to demonstrate that it can provide an appropriate free education" to the child, *id.* at 4, and pointed out that the county's five high schools were serviced by only one certified learning disability instructor. The court concluded that the child did not have a few years to wait for the learning disability program the system hoped to develop. *Id.* at 6. Although the *Rowe* parents had obtained specialized learning disability instruction for the child in the face of plainly inadequate services offered by the school system, the Fourth Circuit barred them from any reimbursement relief. *See Rowe v. Henry County*, 718 F.2d at 116.

The effect of such a rule is that a child must remain in an arguably inappropriate placement until a district court properly has jurisdiction and can issue a preliminary injunction.[32] Not only is this rule contrary to the explicit legislative history of the (e)(3) provision, but treats these special needs children as though they were nonperishable commodities able to be warehoused until the termination of in rem proceedings. Current research indicates that full development of reading and other skills will more likely occur with learning disabled children, like the child at issue here, if adequate remedial services are provided in the early primary grades. Later intervention generally appears to require special services over a longer period of time to achieve a similar rate of remediation. Some skills must be learned early in the brain's maturation process for them to be learned well, or in some cases, at all. Delay in remedial teaching is therefore likely to be highly injurious to

[32] The matter would not reach court until all the administrative appeal procedures had been exhausted, which, in Massachusetts, might take as long as one year.

such children. *See* 121 Cong.Rec. 37412, 37416 (Nov. 19, 1975).

In *Brookline* we concluded that

> permitting reimbursement promotes the purpose and policy of the Act. If the parents are incorrect in their claim that the IEP provides an inappropriate education for their child, they, like any other parents, should bear the financial burden of giving their child a private education. If the school committee's proposed public placement is held inappropriate, then through reimbursement all parties are restored to the position the Act sought to achieve. In turn, "[f]or the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection Congress would have intended, however great the shortage of funds."

Brookline at 921 (footnote and citation omitted). Permitting reimbursement allows the child to receive the education thought to be appropriate by his or her parents, the party normally vested with the power to make such decisions. Barring reimbursement or forbidding transfer would compromise this parental right, a right sought to be encouraged by the Act. But, as we held in *Brookline*, reimbursement will not be available to parents if it turns out that the school system had proposed and had the capacity to implement an appropriate IEP. This financial risk is a sufficient deterrent to a hasty or ill-considered transfer; a complete bar to reimbursement should not be imposed on the parents for acting unilaterally.

[32] Some courts have made a distinction between a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any attempt to

achieve a negotiated compromise and agreement on a private placement. *See, e.g., Blomstrom v. Massachusetts Department of Education*, 532 F.Supp. at 713. We believe this to be a reasonable distinction, one which may be taken into account in a district court's computation of an award of equitable reimbursement. The Act envisions a cooperative IEP process and prefers a change in placement of a child to occur as a result of agreements between parties. *See* § 1415(e)(3).

The Does and the State also argue that they "otherwise agree[d]" within the meaning of the statute, § 1415(e)(3), and their agreement retroactively cured any taint of a unilateral parental transfer. The agreement the defendants point to is the BSEA decision in accord with the parents' choice of the Carroll School. We need not rule on this claim, however, because we do not find either a statutory duty for the child to remain in one placement for the pendency of all proceedings, or that a parental move after an attempted negotiated settlement with the school system constitutes "unclean hands."

Even were we to utilize the parties' approach that the child was moved from the "current placement" per § 1415(e)(3), we could not reach the Town's conclusion that such action contravened the Act. The Town and parents agreed that the current placement was inappropriate; they only disagreed as to which school and program the child should be moved. We cannot in good faith condemn the parents for moving the child from the "current placement" all parties had agreed to be insufficient. As we have emphasized, Congress valued consistency in a disabled child's education, but not foolish consistency.[33]

To summarize, we do not agree that a unilateral parental move constitutes a bar to reimbursement of the parents if their actions are held to be appropriate at final judgment. Reimburse-

---

[33] "A foolish consistency is the hobgoblin of little minds adored by little statesmen and philosophers and divines."—Ralph Waldo Emerson

ment must be denied to the parents if the school system proposed and had the capacity to implement an appropriate IEP. Because the Act envisions cooperatively discussed and negotiated IEPs and placements, whether parents made a specific proposal for a private placement and attempted in good faith to gain an agreement with the school system before moving the child may be taken into account as a factor in determining the amount of reimbursement.

B. *The Parents' Right to Rely on the State Administrative Decision*

The State and Does argue that where the parents have relied on a final state administrative decision in their favor, a town or local educational agency should be estopped from obtaining retrospective reimbursement even though it prevails at final judgment. The Town maintains it is entitled to recover all monies it expended for John's education at the private school, should it prevail.

This court has affirmed the availability of equitable reimbursement to a prevailing party as a general matter in *Doe v. Brookline*, 722 F.2d at 919-21.[34] The posture of that case, however, was markedly different from this one. In *Brookline*, the state hearing officer ruled that the Town's proposed IEP, under which it planned to transfer the child from the private school he had been attending for two years at public expense, and reenroll him in a public school with special services, was adequate and appropriate. The parents then rejected the BSEA's decision and appealed to federal court. By contrast, here the parents maintained John in the Carroll School consistent with a state agency order in their favor. It was the Town that brought suit to reverse the State agency decision.

[34] We applied the *Brookline* approach to reimbursement in *Doe v. Anrig*, 728 F.2d 30 (1st Cir.1984) (second appeal) (*Doe v. Anrig II*).

The Does argue that unless parents are of considerable means, few will be able or willing to implement a state agency decision in their favor if they stand liable to reimburse a town or local school system at final judgment. Cognizant of other situations, the State points out that where a state agency orders a town to fund a private placement, after ruling against a town's IEP, parents will be placed in the difficult position of having to choose between the state directive to maintain the child in the private placement at the risk of ultimately using their own funds, or of moving the child to the town's placement which the state agency has determined to be inadequate. Choosing the latter option would contravene the express congressional policy of consistency and adequacy in a disabled child's education during an IEP contest; should the judicial decision uphold the State and parents, the child will have spent two and possibly three years in an inappropriate school. In sum, the State and Does argue that in order for the Act to provide appropriate education for disabled children from wealthy and poor families alike, parents must be entitled to rely on a state administrative decision in their favor, and not be put at risk for reimbursement by a judicial judgment which reverses that decision.

Considering the Act as a whole and the interests it seeks both to protect and to further, we conclude that appellants' contentions must be sustained in part in the present case. Retroactive reimbursement by parents is not "appropriate" relief within the meaning of § 1415(e)(2) where they relied on and implemented a state administrative decision in their favor ordering a particular placement. We emphasize again that our interpretation is guided by the cooperative federalism *Rowley* elaborated. The states are the chief arms of the federal Act's enforcement; their decisions should not be disregarded because of potential parental financial liability. Implementation of a state agency's determination of the appropriate education for a

disabled child should not be delayed until the statute of limitations on an appeal has run or until a final judicial decision has been rendered where an appeal has been taken. Congress, through the principal author of the Act, has spoken unequivocally in this regard: "I cannot emphasize enough that delay in resolving matters regarding the educational program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development." 121 Cong.Rec. 37416 (Nov. 19, 1975) (remarks of Sen. Williams, explaining Conference Committee bill to the Senate).

Cooperative federalism also requires the federal courts to accommodate state laws and regulations that place greater duties on towns than those imposed by the federal Act, *see supra,* Part II. The governing Massachusetts regulations require that "whenever a placement is . . . ordered [by the state agency] . . . such placement shall be made forthwith, without any unnecessary delay." Mass.Admin.Code tit. 603, § 409.0. Further, "[n]o parents shall be required to bear any part of the cost of the instruction and support actually rendered or furnished to their child by a private school in which such child is placed pursuant . . . to an order under Chapter 4 [by the state agency]." Mass.Admin.Code tit. 603, § 504.5(e). Thus the State's procedures contemplate immediate implementation of the state agency's orders without risk of reimbursement on the part of parents. We think such an arrangement does not contravene the federal Act, and is a question of state-town relations in which the federal courts need not interfere.

[33, 34] We hold, therefore, that where the final state administrative decision rules a town's proposed IEP inappropriate and orders the town to fund placement, and the parents have complied with and implemented that decision, a town or local

educational agency is estopped from obtaining reimbursement for the time period, usually one year, covered by the state agency decision and order. Here, however, the parents could not have relied on a state agency decision until January 1980, the middle of John's first year at the Carroll School. Although the enrollment of John in the Carroll School in August may have been a wise course of action, the parents had no basis for relying on a decision that had not yet been made. Accordingly, should the Town again prevail on remand, the parents can claim a "safe-harbor" estoppel from reimbursement only for that portion of the school year subsequent to the BSEA decision.[35]

We cannot, however, endorse the defendants' proposed rule that the Town automatically be estopped from obtaining reimbursement for any and all expenditures during the entire period encompassed by judicial review proceedings. Their view is that parents are entitled to rely on the last state agency decision throughout the case, not just for the one year to which the decision was addressed, regardless of which party prevails. This smacks more of a penalty against the Town for bringing suit as an "aggrieved party," § 1415(e)(2), than appropriate equitable estoppel. Moreover, the congressional policies of cooperative federalism and minimal delay in implementation of a state agency decision are not served where no applicable state agency decision exists. Because, in addition, we recognize that the needs of disabled children change over time, *Brookline*, 722 F.2d at 918, we hold that parents do not have

[35] A safe-harbor is justifiably available to parents after a final state agency order, as opposed to a court-ordered preliminary injunction, *see Brookline*, 722 F.2d at 921 n. 10, because under our cooperative federalism approach a state agency should be free to order a local educational agency to provide nonreimbursable interim relief pursuant to state authority over its subdivisions without interference by the federal courts. On the contrary, when parents seek preliminary injunctive relief from a federal court, they must accept such relief under the risk of repayment should they ultimately lose on the merits.

an absolute right to rely on a state order subsequent to the time period for which it was issued.[36] To be sure, in the present case the State ordered the Town to continue funding the Carroll School placement after 1979-80, despite the lack of IEPs or state substantive reviews for those years. Because of the unusual posture of this case, we think the relevance of this state action on behalf of the Does to the question of reimbursement for the years after 1979-80 is properly left for the district court to resolve in accord with the concerns we have expressed, *supra*.

[35] The relation of *Brookline* to our rulings on reimbursement here should be made explicit. In *Brookline*, we recognized the *availability* of reimbursement to a prevailing party, 722 F.2d at 921; *see also Doe v. Anrig II*, 728 F.2d 30 at 31 but did not hold that reimbursement was *automatically* to be awarded as a result of prevailing on the merits. We viewed it then, as now, to be a matter of equitable relief, committed to the sound discretion of the district court. In *Brookline*, as noted *infra*, we found that serious procedural errors could foreclose the availability of reimbursement to a town. In the instant case, we hold additionally that parental reliance on a state order of relief forecloses the availability of reimbursement for the period of reliance and requires that where parents have paid the bill for the period, they must be reimbursed.

We conclude this section by stating what we hope is by now obvious in situations where reimbursement is an issue; whether to order reimbursement, and at what amount, is a question determined by balancing the equities. Factors that should be

---

[36] In future cases we envision that towns will continue to prepare IEPs for subsequent years and that parents will seek state review of those IEPs, *see supra*. If the state agency finds for the parents in subsequent years and orders continuing nonreimbursable relief, then a safe-harbor from reimbursement would also arise under those subsequent decisions and orders.

taken into account include the parties' compliance or non-compliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters.

C. *Bad Faith as a Bar to Reimbursement*

[36] The State and Does argue that the range, frequency, and gravity of the Town's procedural violations amount to "bad faith" as adumbrated by Judge Swygert in *Anderson v. Thompson*, 658 F.2d at 1214, and therefore should bar reimbursement to the Town by the parents. We applied the Seventh Circuit's reasoning in *Doe v. Brookline*, 722 F.2d at 921, where we held that "serious procedural errors are grounds for denial of reimbursement." If the district court finds that the procedural violations were serious, and thus constitute bad faith, then reimbursement can be denied the Town.

D. *Other Reimbursement Issues*

[37] The final question on reimbursement for tuition and related services is the appropriate method of calculating the measure of reimbursement if the Town prevails. We do not accept the defendants' argument that the parents are entitled to offset the Town's average cost per student. We agree with the offset made by the district court following Judge Aldrich's ruling that the parents had the burden of showing "the town's actual savings, such as marginal costs it would have incurred in any case, and the funds received from the state for [John's] education." *Doe v. Anrig*, 561 F.Supp. at 130.

The issue of reimbursement for medical and other evaluations of John is not dependent upon who prevails, as the district court rightly observed. Defendants' contention that the district court erroneously left some of these costs to be borne by the parents cannot be sustained. We affirm the district court's decision on this issue.

V. CONCLUSION

We are fully aware of the time and effort that has gone into this case by two very able judges as well as the attorneys and parties, but a remand is necessary. This is, to put it mildly, a difficult Act to interpret and effectuate. Congress has combined elements of a number of different statutory schemes and visited on the judiciary the task of making them mesh. We have done our best to follow the intent and purpose of the Act to ensure "a free appropriate public education" for all handicapped children, but the path has not been easy.

Summary

On remand, the district court must review the state administrative proceedings in accord with the standards set forth herein giving due consideration to the Town's procedural violations and the state's substantive standards.

In determining whether additional evidence should be received, the court starts with the record of the administrative proceedings. From there on, the question of the admission of evidence is for the discretion of the district court within the guidelines set forth.

The district court must give the state administrative findings careful consideration bearing in mind that the state agency's decision that the Town did not meet the state's substantive and procedural requirements is entitled to deference.

The district court must make a finding as to the nature of the child's learning disabilities in order to evaluate properly the IEP.

The burden of proof as to subsequent years falls on the losing party in the dispute over the 1979-80 IEP.

Once the district court reaches its decision, it may order reimbursement in accordance with the principles discussed in section IV, *supra*.

Reversed in part. Affirmed in part. Remanded for further proceedings consistent herewith.

Costs awarded in favor of defendants-appellants.

APPENDIX

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
>
> (B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved

in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency

or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection

(c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

United States Court of Appeals for the First Circuit

No. 83-1424

TOWN OF BURLINGTON, ET AL.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellants.

No. 83-1425

TOWN OF BURLINGTON, ET AL.,
Plaintiffs, Appellees,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee,

JOHN DOE, ETC.,
Defendant, Appellant.

No. 83-1426

TOWN OF BURLINGTON, ET AL.,
Plaintiffs, Appellants,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

JUDGMENT
Entered: May 29, 1984

These causes came on to be heard on appeal from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed in part, affirmed in part and the cause is remanded to the district court for further proceedings consistent with the opinion filed this day.

Costs to appellants.

By the Court:

/s/_____
Francis P. Scigliano
Clerk.

[cc: Messrs: Rosenberg, Berman and Ms. Janos]

United States Court of Appeals for the First Circuit

No. 83-1424

TOWN OF BURLINGTON, ET AL.,
PLAINTIFFS, APPELLEES,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS, APPELLANTS.

No. 83-1425

TOWN OF BURLINGTON, ET AL.,
PLAINTIFFS, APPELLEES,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT, APPELLEE.

No. 83-1426

TOWN OF BURLINGTON, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS, APPELLEES.

Before CAMPBELL, *Chief Judge*,
SWYGERT,* *Senior Circuit Judge*,
and BOWNES, *Circuit Judge*.

ORDER OF COURT

Entered June 29, 1984

The motion for rehearing and rehearing en banc is denied. The following remarks respond *seriatim* to plaintiff's petition.

* Of the Seventh Circuit, sitting by designation.

I. Plaintiff perceives a dilution of the federal least restrictive environment guarantee if state law is enforced per the opinion. This guarantee, however, in contradistinction to the veiled premise of plaintiff's argument, must be applied "without derogating from the substantive level of education required by the Act." *See* slip op. at 29, n.19. Admittedly, a tension may exist between 20 U.S.C. § 1401(18) and §§ 1412(5)(B), 1414 (a)(1)(C)(iv), but accommodation of both congressional directives is the court's express goal.

II. Contrary to petitioner's assertion, the Town's procedural violations were discussed pervasively in the administrative hearing. *See, e.g.*, A. III, pp. 15, 21, 24, 45, 361, 364, 378. That plaintiff chose to argue only one procedural violation in its final administrative hearing brief despite the repeated charges at the hearing does not change the fact that it had actual notice of the procedural charges. This court declines to rescue the plaintiff from its stance of stubborn indifference to and deprecation of its violations of John's procedural rights.

III. Plaintiff placed this issue in contention. *See* Town's Brief at 19 (submitted to this court Nov. 1983).

IV. The district court concluded as *a matter of law*, that, regardless whether the violations of state law were substantial or trivial, they were irrelevant to her decision under the federal Act. Plaintiff's statement, "When in the present case, the District Court Judge concluded that the past violations were irrelevant, she did so on the basis of uncontroverted evidence. . . ," is a patent misrepresentation. *Compare* Pet. for Rehearing at 14 *with* slip op. at 29 and quote therein. The Town can, however, on remand press its view that its violations of state law were insubstantial.

V. We do not believe that plaintiff's proposed rule, which was announced but not followed by the district court, is appropriate. A *de novo* trial, which plaintiff's rule would sponsor, is proscribed.

On page 34 of the slip opinion, line 1, the sentence should read: "In ruling on motions for witnesses to testify, a court should weigh . . . ."

VI.-IX. The opinion speaks for itself.

X. Plaintiff apparently has not read the opinion carefully. *See* slip op. at 60-61 (parents may offset "the Town's actual savings . . . and the funds received from the state . . .").

By the Court:

/s/ Francis P. Scigliano
Clerk.